83-1758

NO._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1983

KENNETH M. LEVENSALER
Petitioner

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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166 pp

QUESTIONS PRESENTED

1. In in an action to revoke a discharge in bankruptcy, must the Plaintiff prove allegations of fraud by "clear and convincing evidence" or, as the bankruptcy court concluded, by "a fair preponderance of the evidence".

2. In an action to revoke a discharge in bankruptcy, must the Plaintiff, in its Complaint, plead the essential elements of § 15 of the Bankruptcy Act (11 U.S.C.A. § 33), including allegations that the Plaintiff was not guilty of laches, had no knowledge of the fraud prior to the discharge and that the facts did not warrant a discharge.

3. In an action to revoke a discharge in bankruptcy, if the Petitioner has the means of knowing the fraud prior to discharge even if it has less than actual knowledge of the fraud, should it not be barred from obtaining a judgment under §15 of the Bankruptcy Act.

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Kenneth M. Levensaler, the Petitioner herein, prays that a Writ of Certiorari issue to review the opinion of the United

States Court of Appeals for the Second Circuit entered in the above-entitled case on February 1, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals is unreported and is printed in Appendix A, infra, page 101A. The Ruling on Appeal of the United States District Court for the District of Connecticut filed August 1, 1983 is unreported and is printed in Appendix A, hereto, infra, page 76A. The Bankruptcy Court's Memorandum and Order dated June 10, 1980 and the Corrected Memorandum and Order dated September 10, 1980 is unreported and is printed in Appendix A hereto, infra, pages 1A and 74A respectively.

JURISDICTION

The opinion of the United States Court of Appeals, for the Second Circuit was entered on February 1, 1984. The jurisdiction of the Supreme Court is

invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 15 of the Bankruptcy Act (11 U.S.C.A. § 33, repealed 1979) which provides as follows:

"The court may revoke a discharge upon the application of a creditor, the trustee, the United States attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and

fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

STATEMENT OF THE CASE

This is an action to revoke a discharge in bankruptcy brought by Hartford Accident and Indemnity Company against Kenneth M. Levensaler. The Complaint was filed in the United States Bankruptcy Court for the District of Connecticut on December 2, 1976. The action was brought pursuant to former § 15 of the Bankruptcy Act, (11, U.S.C.A. §33).

In 1975, the appellant, Kenneth M. Levensaler ("Levensaler") was, President of Johnson Electrical Co., Inc. ("Johnson"), a major electrical contractor with offices and/or subsidiaries in Connecticut, Maine and Florida, which suffered financial reverses and was ultimately adjudicated a bankrupt on October 20, 1975. Levensaler had personally guaranteed Johnson's payment and performance bonds. When Johnson defaulted on its construction contracts as a result of a shutdown of operations, the

bonding companies stepped in and completed the jobs under construction. As a result, Hartford Accident and Indemnity Company ("Hartford"), one of the bonding companies involved, suffered substantial damages and became one of Levensaler's major creditors.

On April 30, 1976 Levensaler filed a Voluntary Petition in Bankruptcy in the United States Bankruptcy Court for the District of Connecticut. The schedule of a Summary of Debts and Property revealed known debts of $37,797,019.00. Hartford filed a timely proof of claim on September 10, 1976 alleging a loss of $2,000,000. Levensaler was granted a discharge in bankruptcy on July 2, 1976.

Hartford alleged in its December 2, 1976 Complaint to revoke Levensaler's discharge in bankruptcy that it received notice of his pending discharge on June 28, 1976, shortly before the discharge date and

that it had an inadequate opportunity to object to it.

The substantive part of the Complaint is comprised of three segments. The first commences with paragraph 9 in which Hartford alleged that it had reason to believe that Levensaler's discharge was obtained through his fraud because:

(a) He fraudulently manipulated and/or misappropriated corporate assets from Johnson in which he was its principal shareholder and President.

(b) He failed to schedule a $50,000. loan from Hope Building Co. as income received in 1974 or as a loan repaid within one year of the Bankruptcy Petition.

(c) He failed to similarly schedule a $5,000. loan from Peter P. Maysa.

The second portion of the Complaint begins at paragraph 10 in which Hartford alleged that Levensaler, prior or subsequent to discharge, received or became

entitled to receive property belonging to the Bankrupt's estate which he knowingly and fraudulently failed to report or deliver to the Trustee in Bankruptcy. In support of these general allegations, Hartford claimed that Levensaler held an interest in a joint venture called Ducci-Woods and/or held an interest in a company called Woods Electric Co. wherein he was entitled to receive or had received money. In addition, Hartford stated that Levensaler, in August, 1976, formed a new electrical contracting company, E. E. S. Corp. with $40,000. paid in capital.

The third segment of the complaint, commencing at paragraph 11, was abandoned by Hartford prior to judgment.

Hartford demanded revocation of Levensaler's discharge in bankruptcy and other relief.

Levensaler, on December 30, 1976, denied the operative allegations of the

complaint, but soon thereafter sought and received permission from the bankruptcy court to include Hope Building Co. as a scheduled creditor.

On June 10, 1980, after a lengthy trial, Judge Robert L. Krechevsky filed a 73 page Memorandum and Order ("Mem.") wherein, inter alia, he concluded that the matters alleged in paragraph 9 and 10 of the Complaint were proven by "a fair preponderance of the evidence" (Mem. pp. 72-73), that when Hartford invoked §15 of the Bankruptcy Act as the basis for its prayer for relief, all of the essential operative elements stated in §15 became and remained a part of this case (Mem. p.p. 68-69) and that the pre-discharge information possessed by the Hartford "was insufficient to bar Hartford's action under §15" (Mem. p. 70). The bankruptcy court concluded by revoking Levensaler's discharge in bankruptcy (Mem. p. 73).

THE RULINGS BELOW.

On appeal to the district court, Levensaler presented six issues, of which three were ultimately abandoned. The remaining three, which will be discussed, were presented to the Court of Appeals, and are still claimed for resolution.

The first issue was that the Complaint failed to include necessary allegations tracking the requirements of § 15 of the Bankruptcy Act, which failure precluded the court from hearing the complaint based upon lack of jurisdiction. The second issue was that the bankruptcy court, in concluding that Hartford lacked pre-discharge knowledge of fraud, improperly determined that the requisite pre-discharge knowledge of fraud was that of actual knowledge rather than merely "the means of such knowledge" as claimed by Levensaler. The third issue was that the court used an improper standard of proof when it held that Hartford

proved the allegations of the Complaint by "a fair preponderance of the evidence" rather than the more rigorous "clear and convincing evidence" standard.

The district court upheld all the conclusions of the bankruptcy court. While acknowledging that federal courts have demanded more than the mere invocation of § 15, the district court commented that certain verbal formulae need not be mechanically recited, nor does it follow that jurisdiction depends upon the recitation of such phrases. (District Court Ruling p. 11). In effect, the district court determined that the necessary allegations may be inferred even if not expressly set forth (District Court Ruling p. 14).

With regard to the "knowledge" issue, the federal court distinguished the cases cited by Levensaler to support his position that a creditor who is aware of or suspi-

cious of fraud prior to discharge is deemed to have knowledge of the fraud. The district court went one step further by declaring that the law is in opposition to Levensaler's stance. It basically concurred with the bankruptcy court's interpretation of the word "knowledge".

The district court approached the burden of proof issue differently. It acknowledged that the question of the standard of proof in a §15 proceeding has "vexed" courts for a long period of time (District Court Ruling p. 21). It recognized that the standard of proof to be used in a §15 matter is a question of federal law (District Court Ruling p. 23). Most importantly, it acknowledged that there are three distinct standards of proof - proof beyond a reasonable doubt, proof by clear and convincing evidence, and proof by a fair preponderance of the evidence (District Court Ruling p. 24). It then

backtracked on its position when it concluded that "there is no inconsistency in speaking of proof by 'a fair preponderance of the evidence which is clear and convincing'".

The district court then attempted to place itself in the position of a fact finder. It reviewed certain material facts found by the bankruptcy judge and characterized the evidence as "clear and convincing." Even though the bankruptcy court held that the allegations in the Complaint were proven by a fair preponderance of the evidence, the district court "found" that the evidence was weightier and should be exalted to a higher level, i.e. "clear and convincing." As the district court surmised on page 26 of its Ruling, "It is apparent that the evidence upon which the trial court did rely was indeed clear and convincing."

The Court of Appeals agreed with the

district court on all three issues. It, too, acted as a factfinder when it stated "Although the bankruptcy court stated that the allegations of fraud had been proven by "a fair preponderance of evidence" id. at 72-73, we are satisfied, as was the district court, that the evidence was sufficient to meet the clear and convincing standard." Thus, without expressing it, the Court of Appeals seems to have at least acknowledged that the proper standard of proof in a § 15 revocation matter is that of "clear and convincing evidence".

The Court of Appeals, without elaboration, concurred with the district court that a revocation complaint need not track the requirements of § 15 as long as the jurisdictional elements can be inferred from the pleadings. It further agreed, without comment, that the bankruptcy court did not abuse its discretion in finding that Hartford was not guilty of laches.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED AS THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND/OR SANCTIONED SUCH DEPARTURE BY A LOWER COURT.

A. In the absence of statute or special circumstances the weighing of the evidence and the determination of its credibility is beyond the scope of appellate review. McCaughn, Collector of Internal Revenue v. Real Estate Land Title & Trust Co. et al, 297 U.S. 606, 802 L. Ed. 879, 56 S. Ct. 604 (1936).

Yet this is precisely the course of action taken by the district court and Court of Appeals when they, in succession, stepped into the shoes of the bankruptcy court and reviewed the evidence to determine if it met the more rigorous "clear and convincing evidence" test. As earlier stated, the Court of Appeals expressed that

it was "satisfied", as was the district court, that the evidence was sufficient to meet the clear and convincing test. Although the trier of fact clearly enunciated the less stringent "fair preponderance of the evidence" standard in weighing the evidence, the Appellate Court subjectly concluded that the higher standard was achieved.

It appears that both the district court and the Court of Appeals impliedly acknowledge that the "clear and convincing evidence" standard should apply to allegations of fraud in a § 15 revocation complaint, but yet, both courts were unwilling to remand for a new trial based upon applicable holdings in Santosky v. Kramer, 455 U. S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

B. Both the district court and the Court of Appeals have made it clear that allegations in the Complaint tracking the

elements of §15 of the Act are unnecessary if reasonable inferences can be drawn from it. Although this represents a contemporary view of pleadings in typical cases, and is consistent with FRCP 8(a)(1), nevertheless the uniqueness of §15 of the Act requires a totally different approach.

That approach was expressed in In re Leach, 197 F. Supp. 513, 520 (W. D. Arkansas 1961) quoting from In re Cuthbertson, 202 F. 266 (D.C.S.D. 1912):

"A mere casual analysis of this section discloses the following elements, all of which must, in my judgment appear in the petition to give the court jurisdiction to act: (1) the application must be made by a party or parties in interest. (2) The petition must allege that the petitioner has not been guilty of undue laches. (3) The petition must be filed within one year after the discharge shall have been granted. (4) There must be allegations in

effect, if true, that the discharge of the bankrupt was obtained through the fraud of the bankrupt. (5) That the knowledge of the fraud has come to the petitioner since the granting of the discharge. (6) That the actual facts did not warrant the discharge."

These stringent legal requirements have uniformly been repeated in case after case where the issue has arisen; In re Marionneau's Case, Fed. Ca. No. 9,088 (1870); In re Mauzy, 163 Fed. 900 (N.D. West Virginia 1908); In re Upson, 124 Fed. 980 (1903); In re McIntyre, Fed. Cas. No. 8,823; Lathrop v. Stewart, 6 McLean 630, Fed. Cas. No. 8,112; In re Oliver, 133 Fed. 832 (1905).

The reason for this unusually strict procedure is the compelling mandate for finality in bankruptcy proceedings. Since revocation renders the discharge a nullity, the courts will view narrowly the procedure

for obtaining such revocation.

It is from this time honored procedure that the bankruptcy court, district court and Court of Appeals have deviated. As the court stated in Solove v. Chase Manhattan Bank, 388 F. 2d 874 (5th Cir 1968), at p. 876 (I)f the Bankruptcy Law is to effectively serve its dual purpose of protecting both debtors and creditors ... there must come a time when a discharge in bankruptcy is irrevocably a discharge." (citation omitted).

C. The bankruptcy court ruled, and both the district court and Court of Appeals affirmed, that Hartford was not guilty of laches which would have otherwise barred its petition.

The rational of the bankruptcy court was that Hartford lacked sufficient "pre-discharge information" to bar Hartford's action under § 15 (Mem p. 70).

However, a different interpretation

was placed on the meaning of the word "knowledge" in the context of §15 of the Act by the Court in In re Oleson, 110 Fed. 796 (N. D. Iowa, 1901) which cited Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, (1879). The age of In re Oleson, supra, is not significant as the language of the Bankruptcy Act has remained essentially unchanged throughout the years until the enactment of the Bankruptcy Code in 1979.

The Court held (in citing Wood v. Carpenter, supra) that the Plaintiff should be held to "stringent rules of pleadings" in this class of cases. It recognized that actions to revoke discharge in bankruptcy are unique and must be dealt with accordingly.

Importantly, the Wood Court also held that "the means of knowledge are the same thing in effect as knowledge itself." It held that "whatever is notice enough to excite attention, and put the party on his

guard, and call for inquiry, is notice of everything to which such inquiry might have led." This pronouncement would lead one to believe that considerably less than actual pre-discharge knowledge possessed by a petitioner would defeat a action to revoke a discharge in bankruptcy. Thus, it would appear that the definition of "knowledge" as declared in Wood v. Carpenter, supra, and follwed by a long line of cases, (In re Oleson, supra; In re Mauzy, supra; In re Howard, 201 Fed. 577 (N.D. West Va. 1913); In re Leach, 197 F. Supp. 513 (W.D. Ark. 1961) has not been followed by the trial court and the appellate courts in this case. No rationale has been provided to account for this change in direction. The basic purpose and intent of the bankruptcy laws to promote finality for the bankrupt has not changed. The "fresh start" concept still prevails. Yet, the lower courts in

the instant case have uniformly refused to consider these material factors in rendering their decisions.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

KENNETH M. LEVENSALER, *Bankrupt* — In Bankruptcy

No. H-76-447

HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Plaintiff*

V.

KENNETH M. LEVENSALER, BANKRUPT, *Defendant*

APPEARANCES:

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Edwin Hebb, Esq., Attorney for Witness, Robert Weinberg, 100 Constitution Plaza, Hartford, Connecticut 06103

MEMORANDUM AND ORDER

KRECHEVSKY, Bankruptcy Judge

I. INTRODUCTION

Kenneth M. Levensaler (Levensaler) filed a voluntary petition in bankruptcy on April 30, 1976, and received a discharge on July 2, 1976. This proceeding is before the court on a complaint to revoke the discharge. The complaint of Hartford Accident and Indemnity Company (Hartford) issued on December 2, 1976, and an answer admitting or denying the various paragraphs of the complaint was received on December 30, 1976. After some discovery, a trial date was scheduled for June 2, 1977. Levensaler then moved for a continuance of the trial to await resolution of investigations by the United States Attorney and a federal grant jury into "possible fraudulent acts committed by the bankrupt and others." The motion contended that while such investigations were ongoing, Levensaler would be put to an "unconstitutional" election "of making the choice between testifying in these proceedings in order to defeat them knowing that his testimony might be made available to the U.S. Attorney in view of the plaintiff's allegations, or refusing to testify and by such refusal allowing the plaintiff to enjoy the knowledge that it has effectively prevented the defendant from properly defending himself". The court at that time, Seidman, B.J., granted a continuance without date on June 2, 1977. On October 5, 1978, 16 months later, Hartford filed a "Motion to Compel Full Trial of Complaint to Revoke Discharge of Kenneth M. Levensaler", claiming that it was then over two and one-half years since the petition in bankruptcy had been filed, and that the setting of an early trial date was necessary to allow Hartford to prove its allegations. After a hearing on this motion to compel full trial, a trial date was set for November 27, 1978.[1] Levensaler, on November 14, 1978, filed a Motion for Trial by Jury, and on November 23, 1978, a Motion for Further

Continuance of the Trial Date. On November 28, 1978, the Motion for Trial by Jury was withdrawn, and Levensaler filed a motion purportedly pursuant to Federal Rule of Civil Procedure (FRCP)12(b) entitled "Motion to Dismiss and for a Bifurcated Hearing on the Standing of Plaintiff to Maintain Its Action to Revoke Discharge of the Bankrupt". To support the request for a bifurcated trial, Levensaler in his motion claimed that on the face of the complaint, "the plaintiff [is] guilty of laches", and "plaintiff is required to show that it has not been guilty of laches before it becomes entitled to seek revocation of a discharge in bankruptcy which the plaintiff has not even pleaded in its complaint". In support of his Motion to Dismiss, Levensaler repeated his allegation that "because of the serious competing constitutional issues raised by the attempt of the plaintiff to force the defendant to testify in this action, which may be violative of his 5th Amendment rights because of the continuing investigation of him by the office of the United States District Attorney, the defendant urgently requests that this court first consider whether the action ought to be dismissed before reaching a trial of the issues raised in the plaintiff's complaint herein". After hearing on December 1, 1978, this motion was denied, and the trial commenced. The trial progressed on the basis of days scheduled for hearing each month until conclusion on September 19, 1979. There were *29* trial days, with testimony from 28 witnesses, many of whom made several appearances. The transcript of testimony and argument on related motions totals nearly 5,000 pages. At the conclusion of the trial, a date was set for submission of memoranda and proposed findings of fact and conclusions of law. After extensions of time, requested and granted, original and supplemental briefs, proposed findings, and proposed conclusions of law were finally submitted by the parties on February 28, 1980.

II. THE COMPLAINT

The amended complaint, in its pertinent allegations, states that the action arose out of and jurisdiction is vested in the bankruptcy court under §15 of the Bankruptcy Act;[2] that the complainant, Hartford, has filed a proof of claim and is a creditor of the bankrupt; that the bankrupt received a discharge on July 2, 1976, and that the complaint for revocation was being filed within one year of the date of discharge. The complaint goes on to state that Hartford had reason to believe that the discharge was obtained through fraud, and that the bankrupt, before or after his discharge, received or became entitled to receive property which is or which became a part of the bankrupt estate, and he knowingly and fraudulently failed to report or to deliver such property to the trustee. In connection with the fraud allegations, the complaint refers to two instances where the bankrupt allegedly failed to report on his bankruptcy schedules income or loans repaid within a year of filing his petition. For convenience, these two instances are denominated in this memorandum as the Hope Building loan and the Peter Maysa loan. With respect to the claimed failure to report property to the trustee, the complaint states that Levensaler has substantial interests in various electrical companies which he has failed to disclose. This issue, with which the majority of the days of the hearing were concerned, will be referred to as "the conspiracy".

III. BACKGROUND TO THIS PROCEEDING

Kenneth M. Levensaler was for two years prior to its demise president and sole stockholder of Johnson Electrical Co., Inc. (Johnson). Johnson was a corporation engaged in the business of electrical contracting for building construction jobs. Johnson's main office was at 124 Francis Avenue, Newington, Connecticut; it had several subsidiaries in other states and generally engaged

in work on contracts involving large dollar amounts. In the spring and early summer of 1975, if not earlier, Johnson suffered cashflow problems. These problems gradually worsened and Johnson came to face a situation where many of its suppliers of inventory refused to furnish it with necessary materials on credit. In late July, 1975, Johnson's main source of financing, the Connecticut Bank & Trust Company (CBT), demanded payment on its debt which exceeded $1,000,000.00. CBT then proceeded to exercise a right of setoff against all of Johnson's checking accounts. On July 31, 1975, letters requesting an informal meeting of Johnson's principal creditors were sent by Johnson's attorneys to such creditors. This meeting, at which Hartford was in attendance, took place on August 4, 1975, at the office of Johnson's attorneys. Prior to August 4, 1975, Johnson had shut down each of its jobs, which were in various stages of completion, and discharged most of its employees. On September 22, 1975, Hartford, with two other creditors, filed an involuntary petition in bankruptcy against Johnson. Johnson then filed, on September 25, 1975, a petition seeking an arrangement under Chapter XI of the Bankruptcy Act. However, Johnson consented to an adjudication as a bankrupt on October 20, 1975, and its case has since continued as a straight liquidation proceeding.

Hartford was the bonding company which had furnished performance bonds to Johnson for a number of its contracts. When Johnson defaulted by failing to complete those contracts, Hartford incurred substantial losses. Levensaler was a personal guarantor for Johnson on these bonds. Upon Johnson's failure, he became liable on his guarantee to Hartford. Levensaler, who was also personally liable on many other Johnson obligations, filed his voluntary petition in bankruptcy on April 30, 1976. The schedule of a Summary of Debts and Property showed that his known debts totaled $37,797,019.00 and his nonexempt property was worth $3,560.00. Hartford has filed a proof of claim in the Levensaler bankruptcy.

There came a time when Hartford determined that Levensaler had taken certain actions, hereinafter described in detail, which if proven, would sustain a revocation of his discharge under §15 of the Bankruptcy Act. It thereupon filed its complaint to revoke the discharge. Hartford claims that it has shown Levensaler's wrongdoing in the three matters expressly referred to in its complaint; the Hope Building loan, the Peter Maysa loan, and the conspiracy. Levensaler not only denies that Hartford has sustained its burden of proof as to these allegations, but claims that even if the claimed wrongdoing did occur, Hartford is barred from prevailing both because Hartford had knowledge of the alleged wrongdoing prior to the granting of the discharge and failed to object to the discharge, and because Hartford is guilty of laches within the meaning of §15 of the Bankruptcy Act.

Other collateral claims of the parties will be discussed as they are relevant in the ensuing analysis of testimony, finding of facts, and conclusions of law.

IV. THE HOPE BUILDING LOAN

A. The Evidence

In September, 1973, Johnson entered into a joint venture with another company, Renzi Electric Corporation for the purpose of performing a sub-contract in Newport, Rhode Island, on a job known as Academic Building No. 2, Naval War College. The prime contractor on the job was Hope Building Co., Inc. (Hope), whose president was Robert B. DiScuillo (DeScuillo). Prior to March 1, 1974, Bernard Renzi (Renzi), the president of Renzi Electric Corporation, wishing to borrow $42,000.00, approached DeScuillo for this purpose and suggested that the borrowing be treated as an advance on the Academic Building contract. DiScuillo agreed that Hope would make such a loan provided the approval of Levensaler was secured. On

March 1, 1974, DiScuillo, Renzi, and Levensaler met at the office of Hope in Rhode Island. Renzi was given a Hope check made out to him personally for $42,000.00, and Levensaler was given two Hope checks payable to him, totaling $42,000.00. At the same time, a document with the letterhead: "A Joint Venture Renzi Electric Corporation The Johnson Electric Corporation, Suite D. Esquire Building, 100 Glen Road, Cranston, R.I. 02920", dated March 1, 1974, addressed to Mr. Robert DiScuillo, Hope Building Company, was given to DiScuillo by Renzi and Levensaler. The document read as follows:

> Re Academic #2
>
> Dear Bob:
>
> For the consideration of $100,000.00 as a loan to Mr. Bernard P. Renzi and Mr. Kenneth M. Levensaler, we agree to make payment of this loan through the Joint Venture of Renzi-Johnson from Academic #2. Interest on the loan prepaid.
>
> Very truly yours,
>
> Renzi/Johnson Electric
>
> S/ Bernard P. Renzi
> S/ Kenneth M. Levensaler

DiScuillo testified at the trial that it had been agreed that $16,000.00 prepaid interest would be charged for this loan, and that was the reason the document referred to a loan of $100,000.00. He further stated that the repayment of the loan was made at the rate of $10,000.00 per month by deducting that amount from the requisitions for payment received from the Renzi-Johnson joint venture. According to him, this repayment schedule had been fully carried out prior to August, 1975, when there was a default on the contract by Renzi-Johnson. After the default, Hope re-

tained another company to complete the unfinished work under that contract.

Hartford's complaint alleged that subsequent to the date of the discharge of Levensaler on July 2, 1976, Hartford learned that Hope had made this loan of $50,000.00 to Levensaler, that it had been repaid by the debiting of contract funds owed by Hope to Johnson, and that no reference to this appeared in the statements and schedules filed by Levensaler with his bankruptcy petition. On January 25, 1977, Levensaler filed an Application for Leave to Amend Schedules to list Hope Building Co., Inc. as an additional creditor for $50,000.00, alleging in his application that he "inadvertently neglected to include one creditor."

Levensaler testified that he did personally borrow $50,000.00 from Hope, but that DiScuillo lied when he said the loan was repaid out of the Renzi-Johnson joint venture by the monthly deduction of $10,000.00. According to Levensaler, the agreement was that if Levensaler did not repay the loan by the time the contract was concluded, the joint venture would declare "bonuses" to Renzi and him which would then be utilized to repay Hope. He stated that the loan was never paid by him nor, to his knowledge, were deductions made by Hope from any monies otherwise due Johnson for its share in the joint venture. Levensaler said he asked for two checks, used a portion of the smaller check ($15,000.00) to buy a new car, and deposited the larger check ($27,000.00) in a personal bank account.

To support DiScuillo's version of the transaction, a copy of a letter, dated May 23, 1974, from Hope and addressed to "Renzi/Johnson (A Joint Venture) 100 Glen Road, Cranston, Rhode Island" was received in evidence. The letter states that "the amount of $144,518.00 was approved as the value of electrical work completed and materials stored at the site". From this amount, the letter indicated that a "10% retainage" of $14,451.00, "previous

payment" of $69,058.00, and "three months' loan deduction per agreement" of $30,000.00 was being deducted. A net check of $31,009.00 was enclosed with the letter. Levensaler's response to this evidence was that all correspondence for the joint venture was supposed to be sent to the Johnson office in Newington, Connecticut, and that he neither saw nor was aware of the May 23, 1974 letter. DiScuillo claimed the balance of the loan due Hope was likewise shown on Hope's books as repaid by deductions from monies due the joint venture, although no documents similar to the May 23, 1974 letter were sent to the joint venture. Peter Maysa, a former employee of Johnson, testified that in November, 1978, he had occasion to review Hope records on behalf of Johnson's trustee, investigating to see if Hope owed Johnson any monies. Nowhere did he find any deductions attributed to the Renzi and Levensaler loans. However, he testified that he may not have seen all the records, that he was not specifically there to look for evidence of the repayment of the loan, and that he would have had no way of identifying such a loan repayment unless it were clearly described as such.

B. Analysis and Findings of Fact

In dispute with respect to the Hope loan are the facts underlying the transaction as well as the materiality of and the reasons for the original failure to list the transaction in the schedules accompanying the Levensaler bankruptcy petition. The fact of the loan is admitted by all parties. Hartford claims that Levensaler's failure to list the $50,000 loan and its repayment in his statement of affairs was intentional and constituted a fraud upon the court and upon it.[3] Hartford further claims that the Application for Leave to Amend Schedules filed by Levensaler on January 25, 1977 was motivated solely by the filing of Hartford's complaint to revoke the discharge on December 2, 1976.

Levensaler relies for his defense on a set of proposed findings of fact. Reduced to the form of argument, these in-

dicate that Levensaler claimed there was no discussion with DiScuillo of a monthly payback of $10,000.00; that he did not receive and had no notice of the letter recording the first three months' deductions; that he has not personally repaid the loan to Hope; that it was still outstanding as of the date of his petition; and that he unintentionally omitted the debt on his original schedules. He remembered the loan only when, in connection with the Johnson bankruptcy, he reviewed a 205(a) examination of a Johnson employee.[4]

It is clear from the record that Levensaler at the date of his petition owed $50,000.00 to someone. If Hope were paid by deduction from the joint venture requisitions in accordance with the DiScuillo testimony, Levensaler's debt to Hope was extinguished. In that case, he would then owe the money to Johnson or the joint venture. If, as Levensaler claims, Hope was not repaid, then he still remained liable to Hope.

Based on the record as a whole and the demeanor and consistency of the witnesses at the trial, the court finds that the repayment plan described by DiScuillo was the method by which the Levensaler loan was repaid to Hope. DiScuillo's testimony to the effect that Hope had no claim based on this loan, and the lack of any documentary evidence to the contrary, suggests that there is no merit to Levensaler's contention that the money is still owed Hope. The letter sent by Hope to the Renzi-Johnson joint venture is persuasive evidence that the $10,000-per-month repayment arrangement was being carried out as of May 23, 1974. DiScuillo's story was thus consistent with the limited documentary evidence presented. It is correspondingly difficult for the court to accept Levensaler's claim that he knew nothing of this method of repayment of the loan. It is not reasonable to believe that he participated to the extent of $50,000.00 in an unorthodox arrangement to borrow money without some understanding with the lender as to how the money would be repaid. He acknowledged, by signing the March 1, 1955 loan agree-

ment, that the loan was connected to the Academic Building #2 job, and his testimony conceded that if the loan were not paid back earlier, it would be taken from monies due the joint venture. The court finds Levensaler's claim that repayment would be made to Hope by having the joint venture issue bonuses to him and Renzi unconvincing. Even if Levensaler's story of the transaction were to be credited, Hope would have been entitled under the March 1, 1974 letter agreement to deduct the loan from the proceeds due Johnson or the joint venture in August, 1975, when the joint venture defaulted. The creditor schedules attached to Levensaler's petition ought then to have shown a debt to Johnson or the joint venture and his statement of affairs to have listed a loan repayment within one year to Hope. None of this was disclosed. The failure to list the debt was of significance to creditors. This omission constituted a concealment of the unusual circumstances under which Hope paid out and Levensaler received money. The trustee of the Levensaler estate would certainly be interested in the potential ramifications of such a transaction. In particular, Hartford, a creditor of Levensaler, involved in paying substantial funds on the surety bond it issued to cover the Academic Building contract, was denied, by such omission, a source of information involving the amount of its obligation on such surety bond.

The court does not credit Levensaler's claim that the Hope loan was omitted inadvertently, and the court finds that Levensaler intentionally omitted the $50,000.00 obligation from his original schedule of creditors and that he amended his schedule nine months later only when Hartford alleged that the omission constituted a bankruptcy fraud.

V. THE PETER MAYSA LOAN

A. The Evidence

In December, 1974, Johnson was engaged in the performance of electrical subcontract work at West Farms Mall in West Hartford, Connecticut. The general contractor on the project was the Taubman Company. Taubman's construction boss at the site was Lyle Randall (Randall). Johnson's site foreman was Thomas Towhill (Towhill). Johnson's project manager on the West Farms Mall job was Peter Maysa (Maysa). On December 19, 1974, Maysa borrowed $5,000.00 on a 3-month promissory note from CBT. On March 19, 1975, an extension of the note was negotiated and a new 3-month note signed. On June 18, 1975, a check for $5,000 drawn upon the Johnson general account was issued to Maysa over the signature of James Woods, then vice-president of Johnson.

Maysa testified at trial that on December 19, 1974, Levensaler asked Maysa to borrow $5,000.00 in cash and lend it to him. This request occasioned the CBT loan to Maysa. Maysa said he obtained the loan in cash at Levensaler's suggestion and gave the cash to Levensaler. Levensaler promised to repay the $5,000.00 plus interest to Maysa when the note fell due. At the first due date, on March 19, 1975, Levensaler did not repay the loan, and Maysa had the CBT note extended. When the second note fell due, Maysa said Levensaler asked it it could be extended again. When Maysa told him that CBT would not extend the note a second time, Levensaler caused the June 18, 1975 Johnson check to be issued to Maysa in repayment of his personal loan. The CBT note was paid by Maysa on the same day. According to Maysa, Levensaler did not, at first, tell him why he needed $5,000.00 in cash. Subsequently, he did tell Maysa that he used $1,500.00 or $2,000.00 of the money to "pay off" Randall at the West Farms Mall project. Randall, as construction boss, was in a

position to approve payment for extra work not called for by the contract. The payoff was to win Randall's approval of such extra work payments for Johnson. Maysa testified that Towhill made this arrangement. He claimed that he later learned that payment was made to Randall, probably at the Johnson offices in Newington on the same day he gave $5,000.00 in cash to Levensaler. Maysa denied that the $5,000.00 check issued to him in June was anything other than the repayment of the loan. He specifically denied that the Johnson $5,000.00 check was given or received as a "bonus" from Johnson for his years of service.

Levensaler testified that the June 18, 1975 check to Maysa was a bonus. He denied that Maysa had loaned either him or the Johnson corporation $5,000.00. He acknowledged that he knew of the CBT notes executed by Maysa. His version of the West Farms Mall payoff differed from Maysa's. Levensaler said that when the subject of a payoff at the West Farms job came up, he refused to be involved. He said that he told Maysa that as project manager, it was Maysa's project and whatever commitments Maysa made, he, Levensaler, would honor, but that Maysa would have to take back the money so utilized as a bonus and pay taxes on it. Levensaler also stated that part of the $5,000.00 was used to buy tickets to a Democratic Party "picnic". Levensaler testified that he authorized the June 18, 1975 "bonus" check to fulfill his December agreement with Maysa. Levensaler specifically characterized Maysa's testimony, that the $5,000.00 check to him was not a bonus but repayment of a loan, as false. The head of the Johnson accounting department, Jeanne Cusumano, testified that when the $5,000 check was drawn, she questioned Maysa as to its purpose and was told by him that it represented a reimbursement to him. She recalled no conversation with Levensaler about the check.

B. Analysis and Findings of Fact

In its complaint, Hartford alleges, *inter alia*, that Levensaler "did not include the sum of $5,000.00 under Section 2(d) or Section 2(e) as a portion of his income received in 1974 or under Section 11 as a loan repaid within one year of the filing of the Petition".[5] Levensaler's revised view of the facts at issue is spelled out in his proposed findings of fact, Nos. 178-180, and is in direct contradiction to his testimony as set forth above. In his request for findings, he asks the court to find the following:

> 178. The defendant borrowed $5,000.00 form (sic) Mr. Maysa on or about December 19, 1974. This money was in turn borrowed by Peter Maysa from CBT.
>
> 179. The money was acquired to be used to make a payment of $2,000.00 to a person who worked for the Taubman Company at Westfarms Mall, and a portion of the money was donated to the Democratic Party.
>
> 180. $5,000.00 was paid to Peter Maysa from Johnson as a bonus to him when he left the company in June or July, 1975. The check, dated June 18, 1975, was signed by James Woods and probably delivered to Mr. Maysa by Jean Cusamano (sic.)

Levensaler also requests the court to conclude as a matter of law, in his proposed conclusion No. 290, that the "payment by Johnson to Peter Maysa was a bonus, and not a repayment of a loan".

By virtue of his proposed finding No. 178, *supra*, Levensaler no longer disputes the fact that he borrowed $5,000.00 from Peter Maysa and apparently retracts his

testimony at trial, where he testified that Maysa did not lend him $5,000.00. Although Levensaler would have this court find as a conclusion of law that the disputed $5,000.00 check to Maysa was a bonus, and not repayment of a loan, he admitted at trial that he authorized the issuance of this check on June 18, 1975, to fulfill his agreement with Maysa made in December, 1974.

I find that Levensaler personally borrowed $5,000.00 from Maysa on or about December 19, 1974, and that the Johnson $5,000.00 check given to Maysa was in repayment of this loan.[6] I further find that Levensaler knowingly omitted this repayment from his schedules.[7]

VI. THE CONSPIRACY

By July, 1975, it was clear that Johnson's financial problems had become so pressing that Johnson would be unable to complete the contracts upon which it was then engaged. Where the contracts were bonded, the companies which had furnished the bonds for Johnson would normally be required either to complete the contract work themselves within the contract price by securing and paying for a substitute contractor, or to pay the person for whose benefit the bond was given the expense incurred by such person to have the work completed. Most of the Johnson contracts were bonded by different bonding companies. At some point prior to August, 1975, Levensaler met with E. John Ducci (Ducci), the president of Ducci Electric Company, Inc. (DEC), an electrical contracting company doing work similar to that of Johnson, to discuss Johnson's uncompleted contracts. Levensaler then notified all his bonding companies, including Hartford, that Johnson contracts were in default. On July 31, 1975, Levensaler and Ducci had a meeting with Insurance Company of North America (INA), one of Johnson's bonding companies, at which Levensaler recommended Ducci and DEC to INA as a reputable contractor, capable of taking over the Johnson contracts bonded by INA. Accompany-

ing Levensaler and Ducci to this meeting was James Woods (Woods), a vice president of Johnson. Subsequently, INA contracted with DEC to have it take over many of the Johnson contracts on the basis that DEC would complete the job for the unpaid balance of the original contract price, and DEC would be responsible to pay all unpaid material and labor bills. Woods formed a corporation in July 1975, called Woods Electrical Company Inc. (WEC), which entered into a joint venture with DEC to complete the INA bonded Johnson contracts. In this joint venture (Ducci-Woods) DEC supplied all of the working capital and WEC performed the work. Following Johnson's shutdown, Levensaler was hired by DEC as a consultant at a salary of $2,500.00 per month. This consulting arrangement started in August, 1975, and ended in February, 1976. Levensaler filed his personal bankruptcy petition on April 30, 1976, and received his discharge on July 2, 1976. On August 2, 1976, a new corporation, Electrical Energy Systems Corp. (EES) was formed, showing $40,000.00 paid-in capital. Ann Levensaler, Levensaler's wife, and Ducci were each stated to be a 50% stockholder. A capital contribution of $20,000.00 attributed to Ann Levensaler was derived from a claimed loan to her from Ducci. Levensaler was the president, treasurer and operating manager of EES.

None of the facts recited in the foregoing narrative are seriously disputed. They form the underlying basis of the claim by Hartford that there was a conspiracy between Levensaler and others, including Ducci and Woods, to perpetrate a fraud upon creditors and upon the court. Hartford alleges in its complaint, pursuant to §15(2) of the Bankruptcy Act, that Levensaler has knowingly and fraudulently failed to report or deliver property to his trustee. Paragraph 10 of the complaint details this allegation in the following form:

> a. Various persons have testified in Rule 205(a) examinations in connection with the bankruptcy of Johnson Electrical Co., Inc. that the bankrupt has a substantial interest in

Woods Electrical Co., Inc. and/or Ducci-Woods joint venture and is entitled to receive or has received substantial sums of money from John Ducci, Ducci Electrical Company, Nutmeg Electric Company and/or other business entities controlled by John Ducci.

b. The bankrupt in August, 1976 organized EES Corporation with $40,000 paid-in capital to engage in the electrical contracting business.

Levensaler maintains that the recited facts do not lead to any conclusion that he has failed to report property, except by resort to speculation and conjecture based on unsupported inferences.

Fair resolution of the issues dividing the parties requires a careful weighing of the testimony received at the trial.

A. The Kerin Testimony

The main basis for Hartford's interpretation of the before-recited events as being pursuant to a conspiracy is testimony received from William Kerin (William) and Jon Kerin (Jon), his son.[8] The two Kerins operate a Hartford insurance agency known as the Kerin Agency. William, who describes himself as a "peddlar, I sell anything I can", has operated this agency for 31 years, and Levensaler employed the agency to secure the performance bonds required on Johnson construction contracts. The agency also handled some of Levensaler's personal insurance requirements. William stated that between October, 1973 and May, 1975, he personally made loans to Levensaler by cash and check totalling $12,900.00. In the spring of 1975, Hartford stopped furnishing bonds for Johnson, and William secured INA as a replacement with lower premium rates. William then described how he and Levensaler worked out a plan to have Johnson pay Levensaler's per-

sonal bills to William for the loans and other insurance indebtedness. According to William, he billed Johnson at a higher rate ($10.00) for the bonds than that charged by INA ($7.50). Johnson paid this higher rate, and William credited the difference between the higher false rate and the true rate against Levensaler's personal indebtedness. Sometime after this arrangement was agreed upon and partially carried out, Johnson went out of business, and many of its uncompleted contracts were taken over by the Ducci-Woods joint venture. William said he went to Woods, explained the arrangement that he had made with Levensaler, and requested that he continue to be paid at the false rate on the INA bonds utilized by the joint venture. William said Woods agreed that he would continue that arrangement, and thereafter, the Ducci-Woods joint venture made payment on bills for bonds at the false rate. Furthermore, the Kerin Agency had previously been paid in full on certain of the bonds, and William admitted that he rebilled the Ducci-Woods joint venture as if he had not been paid and thereby received double payments. William also said that in 1974 and 1975, return premiums due Johnson would not be sent to Johnson but used by Kerin to reduce Levensaler's personal indebtedness. William next testified to a conversation with Levensaler which took place on August 4, 1975, the day of the Johnson creditors' meeting. This meeting between Levensaler, William and Jon was held at the office of the Kerin Agency. According to William, Levensaler began by stating that the upcoming creditors' meeting was the first step of his attorney's "ingenious plan to orchestrate a bankruptcy". Under this plan, Levensaler said, Ducci would take over the Johnson contracts from the bonding companies responsible for their completion; Woods would organize a new corporation in which Levensaler was to be a 60% owner and Woods a 40% owner; and that the profits from these contracts, estimated at one million dollars, would be divided 50% to Ducci and 50%to Woods and Levensaler. Of the latter 50% Levensaler would take 50% and Woods 40%. William stated that Levensaler said that with this plan, Hartford and CBT would get hurt, but that William, the Aetna, and INA

would not, although how that was to come about was not explained. William also testified to a meeting with Woods and Levensaler at a restaurant held prior to the August 4, 1975 meeting at the Kerin Agency, where Levensaler described a method of falsifying Johnson's books or records so as to show certain inventory suppliers to Johnson as paid on the nonbonded Johnson jobs and unpaid on the bonded jobs. William was unable to state how this arrangement would operate in practice to provide the joint venture with the million dollard profit. He stated that at some point during the summer, he showed Levensaler and Woods a warehouse that he owned for the potential housing of inventory. However, he said Levensaler and Woods decided to look elsewhere. He also repeated a conversation with Levensaler sometime that summer in which Levensaler discussed opening a nonunion shop and getting some inventory from Ducci. William repeated a conversation he had with Ducci during the summer of 1975 in which Ducci told him that he had a warehouse in Torrington, Conn., that contained $300,000 of material, some of which was removed from Johnson job sites or the warehouse of Johnson. He stated that either Ducci alone or together with Levensaler told him that the materials in the warehouse were to be sent to Levensaler at his new company for the purpose of lowering the new company's costs and increasing its profits. William stated that for the prior eight years he had been the bonding agent for DEC. Under cross-examination, however, William modified a number of the significant points in his story of what Levensaler told him. He agreed that Levensaler had never told him that any inventory was to be taken from Johnson's warehouse or job sites and put into another warehouse, that he did not know where the inventory was coming from to put in the warehouse that Levensaler and Woods spoke about, and that he really didn't know how the reallocation of the accounts of Johnson was to be undertaken. He admitted that he did not hear Ducci state that some part of the $300,000.00 of inventory in the warehouse had come from Johnson. However, William did insist that he was told by Levensaler that, in fact, a plan had been carried out but he

was unable to specify when or where, or what specific language was used by Levensaler. William stated that after the Johnson bankruptcy in September 1975 started, he told Hartford, Aetna and INA about the plan to change Johnson records so as to defraud bonding companies. He also talked to the Federal Bureau of Investigation. William admitted that he had had a serious head injury in January, 1973, which resulted in his having memory lapses from time to time.

Jon Kerin's testimony was generally consistent with his father's testimony as to what Levensaler had said at the meeting at the Kerin Agency on August 4, 1975. He said that Levensaler first stated that his attorney had devised a plan for "going bankrupt" that would not hurt any creditor except Hartford and CBT; that CBT had called a Johnson note, leaving Johnson no alternative but to declare bankruptcy; that all payment of the bills on the INA bonded jobs was current, and it would be profitable to complete those contracts; and that the jobs bonded with Hartford had specifically not been paid by Johnson. Jon stated that it was not clear to him as Levensaler spoke whether the plan was one to be carried out in the future, or one that was already in progress. Jon said that Levensaler told them that from the profits of the Ducci-Woods joint venture, 50% was to be kept by Ducci, and 30% was to go to Levensaler and 20% to Woods. The profits due Levensaler were to be delivered in the form of inventory at a later date. Jon stated that there was no mention of this being Johnson inventory; that the only discussion was that there would be inventory; and that Levensaler was going to enter into a rebilling of suppliers which would somehow contribute to the profit that the Ducci-Woods venture would receive. Jon stated he was never told how this would actually be carried out. He testified that Levensaler never stated the amount of inventory he was to receive or where the inventory was to be located. Jon said that Levensaler claimed he had a writing from Ducci to protect himself if Ducci ever reneged, but he did not show them the writing. Between nine and twelve months later, Jon met Levensaler

for lunch. He asked Levensaler what happened concerning the plan with regard to the Johnson contracts, and was told only that Ducci was now angry with the Kerins and that Levensaler had been laid off by Ducci. Jon testified that he had met with Ducci in August of 1975, when he delivered a bond to Ducci for one of the jobs taken over by the joint venture. Jon advised Ducci that he would have difficulty in securing any more bonds for the balance of the contracts being completed. Jon stated that Ducci said "He had a million dollars of grabass going on and that if my old man and I didn't get him the bonds, that we were all done". Jon stated that he had many discussions during this period with Woods, but at no time did Woods ever refer to any Levensaler ownership in WEC or indicate that Levensaler had any interest in the Ducci-Woods joint venture. He also showed Woods some warehouse space which Woods said he needed for his new business. Jon testified that he never was told by Levensaler how the alleged change in Johnson accounts was to increase profits in the INA contracts taken over by the joint venture. He recalled a telephone conversation with Penrose Wolf of Hartford, sometime after the Johnson petition, where he attempted to advise Wolf that there were questions about the Johnson bankruptcy, but Wolf would not talk to him.

B. The Cusumano Testimony

Jean Cusumano (Cusumano) was the head of the Johnson accounting department and was hired for that purpose in October, 1974. Although Johnson shut down on its jobs in the week preceding August 4, 1975, and most of the employees were dismissed at that time, she remained in Johnson's employ until October, 1975. In part, her duties after the shutdown were to make up and furnish to the bonding companies schedules of receivables and payables on the various construction jobs which were left unfinished by Johnson at the time of the shutdown. Cusumano, who spent three days testifying, reviewed in great detail the accounting procedures she installed at Johnson. Many of the

exhibits in this proceeding, i.e., cancelled checks, vouchers, invoices, journals, etc., of Johnson were identified and introduced through her. She stated that she was not aware of any payments ever made to Johnson suppliers without receiving supporting documentation of delivery of goods. She had no personal knowledge of any wrongdoing at Johnson but was suspicious of the following occurrences. She identified three Johnson checks made out to Sticklor Electric Supply Co. (SES), a supplier to Johnson during this period, which had not been credited on the Johnson accounts payable ledger as payments on account of the outstanding balance. She admitted there could be an explanation for this, but it was an unusual procedure. She stated that she was aware that at the time of the shutdown the Johnson warehouse was filled with material and that it gradually emptied as the summer months went by. She testified that one of Levensaler's attorneys came to the Johnson office to obtain information for the preparation of bankruptcy schedules and stated in her presence that a list of assets should be prepared "except for assets that would disappear". She stated that at the time the attorney said this, he was accompanied by a young woman from the attorney's law office.[9]

C. The Penna Testimony

Rose Penna (Penna) had been employed at Johnson in the purchasing department for nine years. She was an assistant to the purchasing agent, and her duties included reviewing for payment invoices received from suppliers against Johnson purchase orders. The purchase order was based on a handwritten document called a requisition. The requisition was normally prepared by the purchasing agent to secure the materials needed by the work force if the items were not in the Johnson warehouse. Requisitions were also made out by Levensaler and Woods. Penna stated that if the purchase order amounted to less than $1,000.00, she had authority to sign the purchase order. If the purchase order exceeded $1,000.00, the order had to be

signed by either Levensaler or Woods. There were, however, a number of instances when she did sign such orders amounting to more than $1,000.00 at the request of Levensaler or Woods.

Penna was one of the employees of Johnson who remained after the shutdown in August and finally left in October, 1975. she stated that she was aware during the months of May and June that Johnson was having a more and more difficult time getting materials from suppliers on credit. She recalled that the only supplier who continued to deliver materials on credit to Johnson after June was Economy Electric Supply, Inc. (Economy). As did Cusumano, Penna said she became aware during the summer of 1975 that the inventory in the Johnson warehouse gradually became depleted.

The main significance of her testimony lay in what she described as an unusual request she received from Levensaler around the end of July, 1975, when the construction jobs of Johnson were in the process of being shut down. She testified that Levensaler had about this time given her a specific instruction that no more purchase orders were to be filled out for any material. However, on or about July 31, 1975, Levensaler came to her with some requisitions which he had filled out by hand, and asked her to type up the corresponding purchase orders. When she brought the orders to Levensaler for signature, he told her to sign the purchase orders, even though for the most part they significantly exceeded $1,000.00 per order. All of the purchase orders were directed to Economy, and were, in her opinion, for large quantities of material. She stated that it was also unusual that the purchase orders, although prepared on or about July 31, 1975, were all to have different prior dates, ranging from July 8, 1975 to July 19, 1975, placed on them. After filling out the purchase orders, she signed them as directed. Levensaler told her that invoices would be received within a day or two from Economy concerning these purchase orders and when they arrived, the purchase orders and invoices were to be for-

warded to the accounting department to be processed for payment in the normal way. In the past, Penna testified, she would normally wait until she received a document called a "packing slip" before forwarding invoices for payment. The packing slip was a document which indicated that ordered material had been received by Johnson. Normal procedure for her was to put together the purchase order and the invoice from the supplier, with the packing slips attached, and send all these documents to the accounting department for processing. In this case, Levensaler said nothing about packing slips. Penna testified that within a day or two, the invoices for these purchase orders were hand-delivered to Johnson by someone from Economy. The invoices were all dated July 25, 1975, and totaled $62,380.19. As directed, she forwarded them without the packing slips to the accounting department at Johnson. She had no knowledge of whether these invoices were ever paid, or whether Johnson received the material ordered under the purchase orders.

D. The Fuller Testimony

In July, 1975, Herbert H. Fuller (Fuller) was the assistant claims manager for Insurance Company of North America (INA). His duties included handling claims on construction bonds issued by INA. Fuller testified that on July 30, 1975, he received a message from the INA office in Philadelphia that Johnson was having severe problems and expected to discontinue operation. Fuller then arranged a meeting with Levensaler at INA by contacting Leslie I. Nathan, Levensaler's attorney. The meeting was held on July 31, 1975 at 3:00 P.M. When Levensaler and his attorney arrived at the meeting, they were accompanied by Ducci and Woods. As far as Fuller recalled, no one on behalf of INA had prior knowledge that Ducci and Woods were going to attend. Levensaler first stated that due to severe cashflow problems, Johnson would not be able to continue. He also said that Woods was leaving his employ, as he didn't want Woods involved in the bank-

ruptcy. Levensaler's attorney then stated that a Chapter XI proceeding was going to be filed, that Johnson was not going to be able to finish the jobs, and that Ducci was ready, willing and able to finish the INA bonded construction jobs. Ducci indicated that he had seen the construction jobs and was ready to go forward with them. INA had issued construction performance bonds on six Johnson jobs in Connecticut, one in Rhode Island, one in Maine, and one in Massachusetts. Fuller testified that when a construction job is in default, it is a matter of great concern to the bonding company to try to get someone quickly to finish the job. If matters are not handled properly, labor walks off the job, materials disappear, and delay penalties under the bond accrue. Fuller stated that the bonding companies also have the option of paying the general contractor its cost of completing the work. Fuller testified further that as a result of this July 31, 1975 meeting, INA hired an investigator to check on the capacity of DEC to finish the jobs, and also to check on the status of the unfinished jobs. In the meantime, INA hired DEC to keep the jobs running on a cost-plus-10% basis. Two weeks later, on or about August 15, 1975, INA entered into a contract with DEC to take over four Connecticut jobs. Shortly thereafter, it contracted with DEC for the remaining two Connecticut jobs and the one job in Rhode Island. Ducci provided INA with an inventory of the material on the job sites. The contracts entered into between DEC and INA concerning the Connecticut jobs, called for DEC to receive all the receivables on the job and pay all the outstanding bills. Fuller said that DEC had been willing to accept whatever risks were involved in making a profit or taking a loss in entering into such contracts. Fuller testified that as to the Rhode Island job, however, DEC refused to take the contract at the original contract price, and INA had to pay an additional amount to DEC above the contract price. Fuller concluded by stating that as a result of these arrangements with DEC, INA sustained only minor losses on all its bonds on jobs where DEC replaced Johnson. Fuller also stated that it was not until the contracts were entered into on or about August 15, 1975, that INA became aware that DEC was going to joint-venture the work with WEC.

E. The Ducci, Dinto and Gallicchio Testimony

E. John Ducci appeared in response to a subpoena from the plaintiff but refused to answer any questions, stating that he was exercising his constitutional privileges based on the 4th, 5th and 6th Amendments to the U.S. Constitution.

Paul Dinto (Dinto), called by the plaintiff, is a son-in-law of Ducci and a vice president of DEC. He described the makeup of DEC as a family corporation, with Ducci as president, Ducci's wife, Frances, as secretary and treasurer, and Ducci's son, William, as a vice president together with Dinto. The company employs 35 to 40 full-time people and is engaged in electrical installation work in industrial, commercial and residential projects. DEC has two warehouses, both located in Torrington. Dinto, although aware of the DEC takeover of the Johnson jobs, denied having any knowledge concerning the securing of these jobs or the mechanics of their operation. He stated that while his duties included the estimation of jobs, he made no such estimation in connection with the Johnson jobs taken over by the joint venture or by DEC. He said he had no knowledge of Levensaler ever being employed at DEC, professed ignorance as to any involvement of DEC with Levensaler, and knew of no inventory ever coming from Johnson to DEC.

Michael Gallicchio (Gallicchio) is the comptroller of DEC and has been for ten years. He testified that Levensaler was employed at DEC for six months starting in August, 1975, as a consultant on the Rhode Island job taken over from Johnson by DEC. Levensaler's rate of pay was $2,500.00 per month, and Gallicchio said he knew of no other payments ever made to Levensaler from DEC. He stated he was not aware of the exact nature of Levensaler's duties, as Ducci had made the arrangements for the employment. Levensaler submitted no timesheets or other work records in connection with this employment. Gallicchio stated DEC had no financial interest in WEC. He

stated that in the joint venture, DEC contributed the working capital, and WEC performed the labor and provided the materials. In response to a subpoena, he presented an invoice dated June 20, 1975 from DEC to Johnson for $10,605.01 for materials supplied to Johnson. He also produced a receipt dated July 24, 1975, showing receipt of payment from Johnson on this invoice. He acknowledged that a Johnson check dated July 24, 1975, previously introduced into evidence, was the manner of payment for which the receipt from DEC was issued. He had no documents to show whether the goods covered by the DEC invoice were delivered to or picked up by Johnson. He denied knowledge of any other transaction between Johnson and DEC. He produced the tax records of the Ducci-Woods joint venture and related finance sheets which showed that DEC contributed a total of $661,912.35 in capital to the joint venture, and received $870,179.95 by the end of the joint venture for a profit of $208,267.60. The joint venture tax return disclosed a net profit of $249,986.54, of which DEC received $208,267.60 and WEC received $41,718.94. He stated that to his knowledge, DEC never received any moneys for storing inventory for the Ducci-Woods joint venture.

F. The Woods Testimony

James Woods, called as a witness by Levensaler, testified he had been employed at Johnson for five years and was executive vice president at the time of his resignation sometime during July, 1975. At the time he left Johnson's employ, he formed WEC, and then entered the Ducci-Woods joint venture in mid-August, 1975. In answer to specific questions from counsel for Levensaler, Woods stated that Levensaler derived no income, profit, property or assets from the Ducci-Woods joint venture or from WEC; and that Ducci discussed with him the formation of a joint venture "a good couple of weeks prior to it actually being formulated". Levensaler gave Woods a $5,000.00 bonus when he left Johnson, and he stated he incorporated

WEC with paid-in capital of $5,000.00. He denied, however, that that circumstance was anything more than coincidental. He stated that he discussed formation of the joint venture with Levensaler but was not sure whether it was in July or August. He stated that Ducci had no interest in WEC and denied that Ann Levensaler, the wife of Levensaler, received any benefits directly or indirectly from the Ducci-Woods joint venture. Woods testified that he had no way of knowing whether Levensaler or Ann Levensaler had any interest in DEC's portion of the Ducci-Woods joint venture, and that the profits of the joint venture was split 70% for DEC and 30% for WEC.

G. The Kelley Testimony

Robert Kelley (Kelley), subpoenaed by the plaintiff, is a certified public accountant with 25 years' experience, whose firm, Kelley-Fitzgerald, P.C., has done all the accounting work for DEC and its related companies for many years. He also was, at the time of trial, the accountant for WEC, the Ducci-Woods joint venture, and EES. In response to the subpoena, Kelley brought his records as they pertained to the joint venture and EES. Kelley stated that Ducci had retained his services in connection with the joint venture at its inception in August, 1975, and that Ducci arranged for him to be accountant for EES.

Kelley reaffirmed that the joint venture had taken over the INA-bonded Johnson contracts in Connecticut, and was responsible for the payables on the jobs and entitled to the receivables due from the prime contractor. He testified that the joint venture, as of December 31, 1976, when the entire project was practically complete, had been involved in contracts totaling $2,818,045.42, had made a gross profit of $443,602.64, and a net profit of $249, 986.54. Kelley then explained how the net profit of $249, 986.54 was divided between DEC and WEC. He stated that sometime early in 1977, Ducci and Woods met with him at DEC's office to review the final figures of the joint venture. At that time,

he was told by Ducci that DEC was taking a 20% "overhead reimbursement", and that the balance of 80% would be divided 50% to DEC and 30% to WEC. Kelley acknowledged that no documentation for the 20% "overhead reimbursement" was supplied or requested. At the time of this discussion, in addition to the profit of the joint venture, the parties included the profits made by WEC from non joint venture jobs. The reason for this, according to Kelley, was that as the joint venture jobs came to completion, WEC was taking on new work for itself, but utilizing personnel and equipment charged to the joint venture jobs. Accordingly, Kelley said, both Ducci and Woods agreed to lump the joint venture and the WEC income for the purpose of dividing the profits. As contrasted with the profit of $249,986.54 for the joint venture alone, the profit from WEC jobs and the joint venture totals $297,525.15. As a result of taking the percentages against this last figure, DEC received 20% "overhead reimbursement" of $59,505.03, plus a 50% profit share equalling $148,762.57.[10] Kelley confirmed that DEC's only function in the joint venture was to supply the working capital. Kelley, upon further questioning, stated that the $59,505.03 reimbursement to DEC was indicated by Ducci as reimbursement for interest expense on borrowed money, telephone and traveling expenses. Kelley said that he had no information that DEC or Ducci owned any portion of WEC. Kelley identified a document in his work papers as a slip of paper in his handwriting which contained the figure "20%" and the word "material" next to it. He was unable to state why the word "material" was used, although he agreed it represented the same 20% overhead reimbursement to which Ducci made claim. Kelley stated that to his knowledge, DEC did not share in any other profits of WEC.

Kelley next testified concerning the formation of EES. The corporation was incorporated August 2, 1976 with $40,000.00 paid-in capital, and 800 issued shares of no par common stock. Kelley stated that Ducci paid $20,000.00 for 400 shares issued to him, and Ann Levensaler paid $20,000.00 for 400 shares issued to her. The $20,000.00

received from Ann Levensaler was loaned to her by Ducci and is represented by a promissory note payable by her to Ducci. The officers of EES are Levensaler, president and treasurer, and Ann Levensaler, secretary. Neither Ann Levensaler nor Ducci devoted any time to the corporation. Kelley indicated that the corporate records reflect a $20,000 noninterest bearing note for monies loaned to the corporation by Ducci. Kelley stated that the EES records indicated no distribution of dividends or return of capital to either Ann Levensaler or Ducci.

H. The Ann Levensaler Testimony

Ann Levensaler, Levensaler's wife, called by the plaintiff, testified that she was the owner of 400 shares of EES, and that Ducci, the only other stockholder, also owned 400 shares. She stated that she paid in $20,000.00 to the corporation for this stock, which money she borrowed from Ducci in July or August, 1976. The corporation was formed on August 2, 1976. She believed that she had executed a promissory note to Ducci for a three-year term and with interest at either 6% or 9% per annum. Nothing had been paid on the note at the time she testified. She stated she never put any other money into EES nor did she ever draw any money out. She thought that Ducci had put another $15,000.00 into the corporation. Ann Levensaler stated she had never seen any of the EES tax returns, and did not work there in 1976 or 1977.

I. The Weinberg Testimony

During William Kerin's testimony, he detailed a plan to defraud bonding companies which he heard about from Levensaler. Levensaler gave the name of Economy as a supplier of material that "he was going to work this with, he was going to help". In William's version of what Levensaler said, these suppliers were going to receive additional payment from bonding companies through a method of

bill-switching by Levensaler after the suppliers had been paid by Johnson. Rose Penna, the Johnson assistant purchasing agent, has testified that on or about July 31, 1975, she had filled out purchase orders, under instructions from Levensaler, made out to Economy, which she felt involved large amounts of unneeded material, at a time when Johnson was shutting down.

Robert Weinberg (Weinberg), called by the plaintiff, is the president of Economy and had been such at the time of trial for about ten years. Economy is a wholesale distributor of electrical materials and had been doing business with Johnson for a number of years. Weinberg stated that he had heard stories about Johnson's bad financial condition during the year prior to Johnson's going out of business, and was aware that Economy had progressive difficulty in obtaining payment of its invoices from Johnson. He was questioned extensively concerning the billing procedures at Economy as they existed in 1975, but Weinberg refused to admit that these procedures were sufficiently consistent that the words "usual" or "customary" could be applied to them. However, it appears from his testimony that sale transactions at Economy included the following. Upon receiving a purchase order at Economy, whether in person, by phone, or in writing, Economy would make up a packing slip on which was handwritten those materials ordered by a customer. One copy of this packing slip was sent to the Economy billing department, and another copy sent to the Economy shipping department. The billing department would then use the packing slip to have a computer-generated invoice made up which was sent to the customer, generally within a couple of days from receipt of the packing slip. The goods which were shipped would have a copy of the packing slip attached to the shipment, and the deliverer of the material would have a signer sheet executed at the time of delivery to be used by Economy as proof that the goods had been received by the customer. Weinberg said it was conceivable that invoices could be sent out prior to delivery of material, but he could not say "with exact certainty" if this ever happened with Johnson.

During Penna's testimony, she identified copies of the six Johnson purchase orders sent to Economy (Penna purchase orders) and copies of 12 Economy invoices received at Johnson (Penna invoices) for the materials ordered by the Penna purchase orders. These invoices total $62,430.19. Although subject to a subpoena duces tecum, Weinberg stated that he was unable to locate at Economy the original Penna purchase orders received from Johnson, the copies of the Economy invoices, copies of any Economy packing slips, or copies of any Economy signer sheets which related to these original orders. Weinberg had no explanation as to his inability to furnish these documents that went beyond mere speculation, in which trial counsel objected to him engaging. When asked further about the Penna purchase orders, Weinberg could not recall anything about them or the invoices which Economy sent to Johnson for payment. He did not recall if he personally had hand-delivered these invoices to Johnson. He also did not recall whether the Penna invoices, all of which were dated July 25, 1975, were, in fact, prepared on that date or later. He stated that he might have spoken to Levensaler when the Penna orders were received or when the Penna invoices were delivered, but he could not recall any specific conversation. Neither did he recall any specific conversation with Levensaler at any time subsequent to July or August, 1975, as to the Penna purchase orders and invoices.

Weinberg next testified to the circumstances surrounding Economy's use of the Penna purchase orders and invoices in making claims against two bonding companies, Hartford and Aetna. He stated that he executed under oath claims for unpaid monies due Economy for materials allegedly supplied to Johnson. One such claim was submitted to Hartford under the terms of the performance bonds it issued on Johnson jobs. Specifically included in this claim were certain of the Penna invoices for $23,022.20 on a total claim of $92,594.83. Economy thereafter received partial payment of $64,226.42 from Hartford on its claims. On or about June 17, 1976, unable to document its invoices, Economy returned $38,000.00 of this money to Hartford

and waived any further claims. Weinberg testified to a like situation with Aetna, where the balance of the Penna purchase orders and invoices were used to secure payment from Aetna under performance bonds issued by Aetna on Johnson jobs. Included in the claim to Aetna were Penna invoices for $39,407.99 on a total claim to Aetna of $48,932.10. Economy returned $45,000.00 of these monies to Aetna when it was unable to document its invoices to Johnson. When specifically asked at the trial if Economy ever sold to Johnson the material covered by the six purchase orders, Weinberg responded in the following fashion: "I don't know. Really, I guess I mean I can't remember. I think that's a better answer. Or I don't have — I don't recall." (T. p. 37, 6/6/79). While he stated that he could not definitely say that Johnson did receive the said material, he had no "knowledge" that any other individual or corporation had ever received the said material. Weinberg testified that he questioned the accuracy of his sworn statements to the bonding companies only when proof of delivery was requested by the bonding companies. He stated that the proofs of claim were made out only nine days after the creditors' meeting (August 13, 1975), and were based on the best information available at that time. In a response to a specific question, he denied that he'd received any monies from either Levensaler, Ducci, Ducci-Woods joint venture or EES when it was necessary to make the repayment to the bonding companies, and only Economy's own funds were so used.

J. The Sticklor Testimony

Through Cusumano, the head of the Johnson accounting department, three checks of Johnson dated February 5, 1975, in the amount of $7,800.00, March 15, 1975, in the amount of $3,700.00 and May 6, 1975, in the amount of $3,800.00, all payable to Sticklor Electric Supply Co. (SES), were introduced into evidence. Cusumano testified that these checks had never been credited against the balance due SES on the Johnson ledgers. The checks

had been endorsed by hand on the back, "The Sticklor Electric Supply Company, Harold Sticklor, V.P.". Harold Sticklor (Harold) was called as a witness by the plaintiff and asked to (1) identify his signature on the checks, (2) whether the checks were hand-delivered to him by Levensaler, (3) did they represent payment on behalf of Johnson for supplies given to Johnson, and (4) whether Harold had returned any monies derived from the checks to Levensaler. In each instance, Harold stated that "Upon advice of counsel, I invoke the Fifth Amendment under the Constitution of the United States."

Marshall Sticklor (Marshall) was thereafter called as a witness by the plaintiff. He stated he was president of SES and Harold Sticklor, his brother, was vice president. The company is in the business of selling electric wiring material to contractors, and in 1975, did business with Johnson. Marshall described the normal procedure for checks received at the company, as being handed to him, hand-stamped for deposit, and then noted on a ledger card of the company for the particular customer. When shown the three Johnson checks dated February 5, March 15, and May 6, 1975, Marshall stated that the signature endorsing the checks was that of his brother, Harold, but that these checks had never been noted on the company ledgers as having been received at the company. Marshall stated that, under SES corporate rules, Harold would have no authority on his own to deal with the funds of the company. He noted that the checks were cashed and cleared the same day that they were written and that he had had no knowledge of what had happened to the proceeds of these checks. In response to the court's inquiry, Marshall stated that he had never heard of these checks until the present trial commenced.

K. The Wolf Testimony

Penrose Wolf (Wolf) is assistant secretary, with 20 years' experience, in the bond claim department of Hart-

ford. He appeared twice at trial, once on behalf of Hartford, and subsequently as a witness called by Levensaler. He testified that Hartford was the underwriter for both bonds on several Johnson projects in 1975 and had become aware of Johnson financial difficulties. Wolf received a letter dated July 31, 1975 from Johnson's attorney, Leslie I. Nathan, giving notice of a creditors' meeting of the major creditors of Johnson to be held on August 4, 1975. Hartford sent a representative to the August 4th meeting. Wolf said that another meeting was arranged with Levensaler and Attorney Nathan for August 5, 1975. At that meeting, Levensaler told Wolf that Johnson's condition was financially precarious and that CBT had called certain Johnson notes. Wolf asked for information with respect to the jobs that Johnson had bonded with Hartford. The information requested was of such nature as to enable Hartford to determine the liability it would incur under its obligations to complete the Johnson contracts. Levensaler subsequently submitted some information but never submitted all that was requested. At the August 5 meeting, Levensaler told Wolf that the Johnson jobs bonded with INA had been assigned to Ducci-Woods, he had completed negotiations with the Aetna on jobs bonded by Aetna, and that he was ready to talk about Hartford-bonded projects. A second meeting between Levensaler, Attorney Nathan, and Wolf was held on August 12, 1975. At that meeting, the Hartford-bonded jobs, as well as the INA and Aetna-bonded jobs, were again discussed. There were no further meetings between Levensaler and the representatives of Hartford. Subsequent to the August 5 meeting Hartford engaged the Collins Electric Co. of Chicopee Falls, Massachusetts to make an independent analysis of the unfinished Hartford-bonded Johnson projects. This analysis included the status of the work done, the amount of work to be completed, and the costs involved.

Wolf testified that there came a time when Hartford received notice of a claim from Economy as a materialman under the performance bonds on certain Johnson projects. Wolf stated that when a claim is presented, Hartford or-

dinarily requests backup documentation in the form of purchase orders, copies of the subcontract, or whatever is appropriate to verify the claim. On the Economy claim, Wolf said that the claim was submitted with an affidavit of Economy's president, Weinberg, and that subsequently, Hartford received copies of the Economy invoices to Johnson. Wolf was also sent a copy of a letter dated December 9, 1975, signed by Attorney Nathan which included the following statements:

A. Kenneth Levensaler of Johnson Electrical is aware of, has reviewed, and is satisfied with the bills of Economy Electric that have been forwarded to Hartford Fire for payment.

B. In view of the above, I can see no reason why Hartford Fire would not pay the claims presented to them to date by Economy Electric.

Wolf stated that based on the Weinberg affidavit, the copies of Economy invoices to Johnson, and the copy of the letter from Attorney Nathan, Hartford paid the Economy claim in December, 1975. Later in April, 1976, Hartford began to reexamine the Economy claim as having been improvidently paid. This led to a settlement agreement between Hartford and Economy, whereby Economy repaid monies to Hartford as described by Weinberg during his testimony. Wolf stated that prior to entering into the settlement agreement with Economy, Hartford had requested further documentation on the Economy claim, specifically, evidence of delivery of the items on the invoices previously submitted. Wolf confirmed that no packing slips, delivery receipts, or signer sheets were ever furnished to Hartford by Economy.(11)

L. The Levensaler Testimony

Kenneth M. Levensaler was called as a witness by Hartford. He reviewed his experience at Johnson where he had worked for 15 years before acquiring all of the common stock of the company and becoming president in 1973. Levensaler stated that he first met Ducci at the monthly meetings of the National Electrical Contractors Association, but that he had had no other contact with Ducci prior to July 1975. Johnson's only business dealings with DEC, he stated, were occasional purchases of material when Johnson needed an item immediately and regular suppliers did not have the item in stock.

Levensaler testified that when he learned on July 22, 1975 that CBT was calling the Johnson note, he realized that Johnson would be unable to continue its operations. Johnson had, at that time, two contracts with Horn Construction Company (Horn) and Levensaler telephoned the president of Horn immediately to tell him of Johnson's dilemma, and met with him the next morning. Levensaler recommended DEC to Horn as an electrical company to take over the Horn contracts at once so as not to stop the flow of the work. He and his attorney then had meetings with INA, Aetna, and Hartford. He said they met once with Penrose Wolf of Hartford, but he could not recall whether there was a second meeting with Hartford. Levensaler claimed that INA and Aetna devoted time to trying to keep the work going on their bonded Johnson projects, while Hartford "chose to go in a different direction". Levensaler was unable to pinpoint the exact time he first decided to recommend Ducci to INA. He testified that after much discussion and thought, he conceived the situation as follows. When a construction company goes bankrupt, it is well known in the industry that "it's a license to steal" for the contractors who take over the defaulted work. He felt the only way to save the Johnson projects was to keep "continuity of labor" and finish the projects as fast as possible since the Johnson projects were profitable. He didn't know exactly what was due Johnson

creditors and the tax authorities, but if everybody had cooperated on what could be done, he said, no one should have gotten hurt. In his opinion, if a contractor is brought in to complete the work who is not local, i.e., not from the same county where the work is being done, the result will be better than if a local contractor were employed. He testified that when he called Ducci after receiving the letter from CBT, Ducci did not immediately accept Levensaler's suggestion that DEC take over the Johnson jobs, but asked to be introduced to the bonding companies and to see the receivables and payables of each job.

Levensaler said he entered into the employ of DEC in the middle of August, 1975, at the pay rate of $2,500.00 per month. His duties were to act as a consultant on the Johnson jobs taken over by DEC. After he stopped working for DEC, in March, 1976, Levensaler testified that he had no source of income other than unemployment compensation, until EES was started in September, 1976. He stated he borrowed $3,000.00 from Ducci in June or July, 1976, and that at the time of trial that loan remained unpaid.

Levensaler denied any recall of the Penna purchase orders. Examination on this subject was extensive, but Levensaler remembered nothing. Levensaler said he did not recall ever telling Penna not to purchase any inventory after July 31, 1975, although he admitted that labor was stopped at Johnson by August 1, or August 2, 1975. Levensaler did not recall personally preparing the requisitions for the Penna purchase orders nor requesting Penna to type them up. He testified he never discussed with Weinberg the material listed in the Penna purchase orders, and he had no arrangement with Weinberg concerning submission of invoices to bonding companies for payment to Economy of outstanding balances owed by Johnson. Levensaler was asked if he had reviewed the Economy invoices listed in the claim of Economy against Hartford, but he denied that he had, even after being shown the letter from Attorney Nathan to Economy's attorney, dated

December 9, 1975, described in Penrose Wolf's testimony, *supra*. Asked how he was able to satisfy himself that the invoices submitted by Economy were accurate, he answered that he had reviewed tallies he assumed were correct and saw no purpose in reviewing each invoice. Levensaler stated he didn't know if Weinberg had the disputed invoices hand-delivered to Johnson, and he didn't know if packing slips were ever received by Johnson for these invoices. He didn't remember telling Penna to process the invoices without receiving packing slips, but he said it was possible, since this was something done every month so that Johnson would know the amount of materials purchased in order for Johnson to bill the prime contractors on the job. He said he was aware that Weinberg had testified to a repayment to the bonding companies, but that did not give him any reason to believe that the materials were not delivered. He did not know whether the materials listed in the Penna purchase orders were ever delivered to Johnson. He denied that he had talked to Weinberg about the Penna invoices between the time that Weinberg submitted its claims to Hartford for payment and the time payment was returned to Hartford by Weinberg.

Levensaler recounted how EES was formed. He said that he was approached by Ducci who asked him if he would run an open shop or nonunion business. Levensaler said that he told Ducci he didn't care if he ran another company at that time, that he didn't have any money to put up as his share, and that he wouldn't take a loan from Ducci. He stated that Ducci then talked to Ann Levensaler, and, as a result, she convinced him, Levensaler, that this was the only business that he knew and that he should go back into business. Levensaler said that only then did he accept because his wife had assets to pay off a $20,000 loan from Ducci. He has been president of EES from its inception and is responsible for all company operations. Levensaler admitted that all bank loans subsequently taken out by EES for business purposes were not endorsed by his wife or by Ducci, but were personally endorsed only by him. During the time that EES has been in existence, Ducci has

loaned EES $15,000 or $20,000. He stated that the discussions with his wife concerning the formation of EES occurred three weeks to a month before EES was actually incorporated. Levensaler denied that he discussed with Ducci in July or August, 1975 the formation of any nonunion shop.

When asked about the testimony of William Kerin, Levensaler stated that William had first asked him what he was going to do after the Johnson bankruptcy. Levensaler stated that he told William that he didn't know, that he had too many problems right then, and that if he ever went back to business, it would have to be a nonunion company. Levensaler stated that William volunteered to invest $25,000.00 in such a venture. According to Levensaler, this conversation with William took place after the Johnson shutdown, sometime between August and October, 1975. He recalled it took place in his office at Johnson and after the creditor meeting of August 4, 1975. He did not remember meeting with William and Jon Kerin on August 4, 1975. He acknowledged that there was an occasion when he told the Kerins that the only people who were going to be hurt by the Johnson bankruptcy were Hartford and CBT. He denied that he ever told Jon and/or William Kerin that his attorney had devised a plan for going bankrupt that would hurt no creditors except Hartford and CBT; that outstanding invoices for jobs bonded by Hartford were specifically not paid before the Johnson shutdown; that he owned 60% of WEC; that a Ducci-Wood joint venture was to take over the Johnson bonded jobs; that Ducci was to get 50%, he was to get 30%, and Woods was to get 20% of the profits of the Ducci-Woods joint venture; that his percentage of the joint venture profit would be worked out through inventory after he started up in business again; that the Ducci-Woods joint venture would make at least a million dollars profit; that there was a plan to change Johnson's records showing which suppliers' bills for materials were paid; that Ducci was storing Johnson materials in a warehouse; or that Woods would pay the premiums due on the Johnson bonds so as to reduce Leven-

saler's personal indebtedness to William. Levensaler admitted that William had lent him some money in the past, but he did not agree as to the total amount of loans claimed by William. According to Levensaler, the payback scheme described by William of billing Johnson at a $10 rate for a true premium of $7.50 and applying the difference to Levensaler's personal indebtedness was "absolutely ridiculous", and he denied he had ever made such an arrangement. He admitted he could have told William that he would not get hurt by the pending bankruptcy and that he was upset with Hartford because it wouldn't listen to his advice on how to avoid or reduce losses. Levensaler said he could not understand how Hartford, as a major bonding company, could afford not to engage the head of the defaulting bonded contractor to go over the jobs. In sum, Levensaler denied ever receiving any benefits whatsoever from the Ducci-Woods joint venture which would be a part of his bankruptcy estate. He repeatedly maintained that he first learned of the Ducci-Woods joint venture in September or October of 1975. When he was shown a document he signed dated July 31, 1975 assigning the Horn jobs to "Ducci-Woods Construction", he agreed that he had signed the document on that date, but he insisted he was not aware of the existence of the joint venture.

Levensaler said that after the shutdown of Johnson, trucks did remove materials from the Johnson warehouse. He testified that these materials included inventory housed at the warehouse for specific jobs which were bonded by INA and that DEC trucks, as INA's contractor, did come to the warehouse periodically to pick up this inventory. He said there was an itemized list made of everything taken by these trucks for the INA jobs. He stated there were other trucks from other contractors which picked up material for other jobs. He denied knowledge of any improper removal of materials from the warehouse. Levensaler was questioned about the checks cashed by Harold Sticklor and denied any knowledge of their issuance, and specifically denied receiving any of the proceeds of these checks.

On cross-examination, Levensaler testified that after CBT had called the Johnson note, he tried to contact the owners and contractors on the Johnson jobs to persuade them to get contractors to come in and finish the Johnson contracts at no cost over the original contract prices. He stated that there was some 12 million dollars of bonds on these Johnson jobs, and that he, Levensaler, had personal liability on all of these bonds so that his own exposure was 12 million dollars. It was on this basis, he stated, that he selected DEC as a capable contractor to complete these bonded jobs within the contract prices and recommended it to the bonding companies. He stated that in an attempt to resolve its financial problems with CBT, Johnson had given CBT a second mortgage on the Johnson property in Newington. However, he claimed that there came a time when CBT set off its unsecured indebtedness against the CBT Johnson bank accounts, and thereby caused the business to come to a halt, since Johnson could not thereafter meet the payroll for its 400 employees. Levensaler stated that he had personally endorsed the unsecured note which had an unpaid balance of $1,200,000.00 to CBT for Johnson. He reiterated his contention that the motive behind all of its actions was to reduce Johnson liability on potential claims upon which he also would have personal liability.

M. Analysis and Findings of Fact

From the foregoing evidence, Hartford requests the court to find that Levensaler with the aid of others retained an undisclosed interest in the Ducci-Woods joint venture, and that Levensaler failed to report or deliver this interest to his trustee. It may be acknowledged at the outset of this analysis that limited direct evidence has been adduced of the entire sequence of events alleged by Hartford, and thus the court, if it finds that Hartford has met its burden of proof, must rely upon inference from such direct and circumstantial evidence as is before it.

The general rule followed by courts of law with respect to the drawing of inferences from evidence is that such inferences may be drawn only where there are proven facts in evidence upon which the inferences can be soundly based. *Galloway v. United States,* 319 U.S. 372 (1943); *Hennessey v. Hennessey,* 145 Conn. 211 (1958). Applying that rule to the evidence before me, and recognizing that the matter is not completely free from doubt, I conclude that Levensaler did have an interest in the profits of Ducci-Woods at the date of his petition in bankruptcy, which interest he failed to disclose. I am led to this conclusion on the following grounds:

At the outset, we have direct evidence of the hatching of the plan to retain such an interest. William Kerin and his son, Jon, testified to the statements made by Levensaler. A plan had been devised in the Johnson bankruptcy which gave Levensaler an interest in the profits of the Johnson contracts to be received by him in a post-bankruptcy business. The Kerins both stated Levensaler told them that in the execution of this plan, Ducci would take over Johnson contracts, Woods would form a new corporation to participate in the performance of these contracts, and Levensaler would retain an interest in the contracts amounting to 30% of the profits derived therefrom. Ducci would receive 50% of those profits, Woods 20%, with the total profit anticipated to approximate a million dollars. Jon testified that in a subsequent conversation he had with Ducci in regard to securing bonds for the takeover of Johnson contracts, Ducci had said that "he had a million dollars of grabass going on and that if my old man and I didn't get him the bonds, that we were all done". Although other aspects of the Kerins' testimony, such as the bill-switching procedure (p. 20 *supra*) were not substantiated, the court credits their testimony as to Levensaler's statement that he retained an interest in profits from the Johnson contracts assumed by DEC. The general consistency of the Kerin testimony with what actually happened, coupled with the fact that the Kerins had no apparent motive for inventing such details, leads me to con-

clude that discussions with Levensaler such as they describe took place. Ducci was recommended by Levensaler to assume the performance of certain Johnson contracts. Woods did establish a new corporation, WEC, and together with Ducci and DEC, formed the Ducci-Woods joint venture to complete performance of the Johnson contracts. The general unreliability of Levensaler in testimonial matters other than those touching the conspiracy, and his obvious motive to conceal such a conspiracy render his denials less credible than the Kerins' assertions. By William's own admission, he was involved in an arrangement with Levensaler whereby through wrongful allocation of Johnson funds disbursed as falsely-inflated bond premium payments, William was enabled to receive corporate payment of Levensaler's personal indebtedness to him. The court finds that this false premium arrangement between Williams and Levensaler did exist and that it presupposes a personal and confidential relationship between William and Levensaler such that Levensaler would have had no qualms in telling William what William claims he told him.

Next, a document of the Ducci-Woods joint venture disclosed entries as follows:

Profit per W/S [worksheet]	$297,525.15
Ducci Electric 20% overhead Reimbursement	59,505.03
Ducci Electric Co. 50% profit	148,762.57
	$ 89,257.55
Woods Electrical Co. 30% Profit	$ 89,257.55

Robert Kelley testified that these entries represented the division of the Ducci-Woods joint venture profit as dictated by Ducci. Kelley stated that Ducci told him first to

allocate 20% of the profits separately to DEC as "overhead expenses". Kelley also testified that a 20% figure was attributed to "materials" in a separate Ducci-Woods account. Kelley said this was the same 20% attributed to "overhead reimbursement" in the entry reproduced above. Kelley had no satisfactory explanation, as an accountant, to support the separate 20% share to DEC. He merely recorded what he was told. Both Kelley and Gallicchio, comptroller at DEC, confirmed that DEC had only contributed capital to the joint venture. In arriving at the profit split, Ducci and Woods included certain profits earned by WEC from non joint venture jobs. The actual net profit attributable solely to joint venture work was $249,986.54. Of *this* amount, the $59,505.03 retained by DEC constitutes 33% rather than 20%. Ducci's explanation that, as described by Kelley, this undocumented retention by DEC of a separate 20% was for interest on borrowed money, telephone, and travel expenses is not convincing. Given the admitted fact that DEC contributed capital only to the joint venture, it is not plausible that in addition to the 50% profit of $148,762.57 DEC also would have been permitted to take $59,505.03 for undocumented overhead expenses. Although Levensaler denied that he was entitled to any part of the Ducci-Woods profits, I conclude that the statement by Levensaler to the Kerins that he had a 30% interest in the profits anticipated from the Johnson contracts taken over by Ducci was true and that the $59,505.03 set aside by Ducci as "overhead expenses" or "materials" represented that interest.

It was admitted by all who testified that Ducci was the source of all the monies used to form EES, the nonunion company solely operated by Levensaler after his discharge in bankruptcy. The books of the company reflect $40,000 received as a capital investment and a $20,000 outstanding non-interest-bearing "loan" from Ducci. Ann Levensaler described the $20,000 Ducci "loan" to her as overdue, with an uncertain interest rate, and unpaid in any fashion in the approximately two and one-half years which elapsed between the incorporation of EES and her testimony. When

considered in the light of the Kerin testimony and the other aspects of the pattern of events related above, I conclude that the Ducci "loans" are paper transactions only and represent the payment, wholly or in part, by Ducci to Levensaler, of Levensaler's interest from the profits of the Johnson contracts taken over by DEC. Although not in complete accord with all aspects of the plan as described by Levensaler to the Kerins, the sequence of events, coupled with the lack of believability of Levensaler, leads me to find that the burden of proof resting upon Hartford in this allegation has been met. Levensaler repeatedly claimed he knew nothing about the Ducci-Woods joint venture until September or October, 1975. Yet, on July 31, 1975, he executed, under oath, an assignment of a Horn contract to the "Ducci-Woods Construction Joint Venture, Woods Electrical Co., Inc., and Ducci Electrical Co., Inc d/b/a". Even Woods testified that he told Levensaler about the joint venture in July or August of 1975. Levensaler says he ws hired as a consultant by Ducci on the Johnson jobs, although Dinto, the vice-president of DEC, was unaware of this hiring. Gallicchio, the comptroller of DEC, said there were no time records kept nor any other evidence of actual duties performed by Levensaler during his employment. Ducci "loaned" another $3,000 to Levensaler during the five-month period between the end of his duties at DEC and the beginning of EES. This sum, according to Levensaler, also remained unpaid at the time of trial. I am conscious of the responsibility of the court not to substitute suspicion, speculation, or guesswork for proof, but the pattern of these actions, when considered with the essential elements of the Kerin story and the cumulative effect of all the evidence, fairly leads to the conclusions being drawn.

As part of the violations of §15 alleged in its complaint, Hartford asks the court to find that events or elements testified to at trial constituted a part of Levensaler's plan to retain an interest in assets belonging to his bankrupt estate. These further requested findings are:

1. That the check issued by Johnson to DEC on July 24, 1975 in the amount of $10,605.01 "most likely" redounded to the benefit of Levensaler;

2. That Levensaler had an interest in the corporation (WEC) founded by James Woods.

3. That Johnson inventories were diverted from Johnson job sites and the Johnson warehouse and concealed in a warehouse controlled by Ducci;

4. That EES received Johnson inventory, after it had been "laundered" through Ducci, for use in its business;

5. That Levensalor had an arrangement with Harold Sticklor whereby he shared in the proceeds of Johnson checks wrongfully cashed by Sticklor;

6. That the Penna purchase orders and invoices are evidence of an arrangement between Levensaler and Weinberg to defraud certain bonding companies; and prove Levensaler's complicity therein;

7. That the arrangement between Levensaler and Weinberg resulted in the delivery of materials by Economy to the Ducci-Woods joint venture, to be used by the joint venture at no cost to it.

With respect to these additional allegations, expressed as requests for findings, the court finds that: (1) there is insufficient evidence to establish that Levensaler received any part of the July 24, 1975 Johnson check to DEC for $10,605.01. Gallicchio produced a DEC invoice in that amount dated June 20, 1975, for materials supplied to Johnson. Although Gallicchio could not furnish documentary evidence that the materials were actually delivered to or picked up by Johnson, he acknowledged that the July 24 check was in payment of the June 20 invoice. Levensaler testified that Johnson occasionally purchased materials

from DEC when they needed a special item and regular suppliers did not have that item in stock. The Johnson disbursement journal showed that on a prior occasion, January 10, 1975, Johnson paid DEC $10,806.53. Although Gallicchio could find no records at DEC relating to this payment, January 10 substantially predates the shutdown period and indicates that Johnson did have financial dealings with DEC other than those relating to the bankruptcy. Given these facts, it would be speculative to find that Levensaler received back part or all of the July 24 payment of $10,605.01.

Although Hartford claims (2) that the court should find that Levensaler had an interest in WEC based on the testimony of William, and the fact that Levensaler paid Woods a bonus upon his leaving Johnson, which bonus it claims permitted Woods to capitalize WEC, the court cannot draw the required inference. Woods denied such an interest, and, significantly, Jon testified that Levensaler never said he had an interest in WEC, but only that he had an interest in the profits of the joint venture. For the court to find such an interest of Levensaler in WEC, I would have to engage in conjecture.

Hartford's request (3) that the court ought to find that Johnson inventories were diverted and concealed in a Ducci warehouse, and (4) that EES subsequently received those inventories for use in its business, depends upon testimony by the Kerin that Levensaler's interest in the joint venture profits would be channeled to him in the form of inventory. Subsequently, Cusumano and Penna both testified that during the period of the Johnson shutdown, the Johnson warehouse in Newington gradually emptied of inventory. William also testified that Ducci had told him of a Ducci warehouse in Torrington which housed $300,000.00 worth of material, to be sent to Levensaler for aid in establishing his new business. Given the testimony just recited, the possibility that what Hartford has alleged actually happened cannot be denied. However, there is no proof of any kind that Levensaler or EES received any

Johnson inventory. No one has been able to trace any such inventory from a Johnson job site or the Johnson warehouse to a place of concealment and thence to EES. Levensaler testified to the removal of Johnson inventories from the warehouse in August, 1975. He said material was picked up for use on specific jobs. Some of this, Levensaler claimed, was material that was paid for and owned by contractors who were merely storing it at Johnson. Other materials, he said, were removed by the Ducci-Woods joint venture with the authorization of INA, to be used on INA bonded jobs. Whatever the propriety of the removals testified to by Levensaler, no one has refuted his explanation of the "disappearing" inventories. The court finds that Hartford has not borne its burden of proof that any scheme to supply Levensaler or EES with pre-petition inventories of Johnson was carried out, even if, as the Kerins claimed, it ever existed.

The allegation that (5) Levensaler received part of the proceeds of checks issued to SES and apparently cashed without authority by Harold Sticklor is without support. Nothing in Marshall Sticklor's testimony could lead the court to so conclude. An arrangement between Harold Sticklor and Levensaler has not been shown by any evidence, documentary or testimonial, and the court cannot find the facts requested by Hartford in this regard, especially in view of Hartford's concession in its brief (p. 82) that "we do not know . . . the exact nature of [Harold's] dealings with Levensaler."

Weinberg's failure under subpoena to furnish proof of delivery with respect to the materials listed in the Penna purchase and invoices leads the court to conclude (6) that these purchase orders and invoices are evidence of a scheme which permitted Economy to submit false claims to the bonding companies. This conclusion is strengthened by the obvious failure of both Weinberg and Levensaler to recall any of the details surrounding the Penna documents, representing transactions in excess of $60,000.00, and the generally evasive and unresponsive nature of their

testimony in that regard. Penna's testimony was not successfully refuted, and her version of the preparation of the suspect purchase orders and receipt of the Economy invoices is found to be an accurate description of events. Without Levensaler's complicity in furnishing the purchase orders and then verifying the appropriateness of payment by the bonding companies, Weinberg would have been unable effectively to make a claim on false invoices for undelivered property. No further inferences, however, are justified. The court has been shown no evidence to support a conclusion that Levensaler became entitled to or received any portion of the bonding company's payments to Economy.

Nor can the court find (7) that a part of that arrangement was diversion of materials supplied by Economy to Ducci-Woods for use by the joint venture. Such a finding would require adequate proof that the materials listed in the Penna purchase orders and invoices were actually delivered. There is no proof that the materials in question were ever delivered to anyone, anywhere. The court finds that the arrangement between Levensaler and Weinberg, however wrongful in itself, has not been shown to constitute part of a plan to permit Levensaler to retain an interest in the Johnson contracts. The allegation that this arrangement represents some kind of fulfillment of the Kerin testimony that part of the bankruptcy plan would be a manipulation of inventory by falsifying Johnson records with regard to inventory suppliers on bonded and unbonded jobs is unproven. The Kerins were never able to explain how the scheme they said Levensaler described to them would work in practice. The arrangement between Levensaler and Weinberg has been shown to be an effort to permit Weinberg to receive improper payments at the expense of the bonding companies. Nothing has been sufficiently shown to indicate Levensaler received anything therefrom.[12]

VII. HARTFORD'S KNOWLEDGE OF THE FRAUD PRIOR TO DISCHARGE AND LACHES IN FILING ITS COMPLAINT

Section 15 of the Bankruptcy Act contains three requirements to which the court must look in determining whether or not an application requesting revocation of a discharge has been timely filed. The applicant must have filed his complaint "within one year after the discharge has been granted", must not have been "guilty of laches", and must have gained knowledge of any fraud alleged as grounds for revocation "since the discharge was granted". In the case before the court, Levensaler's discharge occurred on July 2, 1976, and Hartford filed its complaint on December 2, 1976. There is, thus, no allegation, nor can there be, that Hartford did not file within the statutory year following discharge. Levensaler has argued from the beginning of the trial that Hartford's failure to file for five months after Levensaler's discharge constitutes laches. In addition, Levensaler claims that Hartford had knowledge, prior to his discharge, of the information leading it to allege fraud. Levensaler claims that Hartford's failure to act timely is a violation of the threshold requirement of §15 and that the complaint should be dismissed. Hartford denies guilt of laches and claims that knowledge of Levensaler's fraud came to it after the discharge was granted. Specifically, Hartford alleges that it learned of the fraud inherent in the Hope Building loan, the Peter Maysa loan, and the conspiracy after July 2, 1976.[13] Thus, the question is a perenially recurring one — what did Hartford know of the Hope Building loan, the Peter Maysa loan, and the conspiracy, and when did it know it?

A. Evidence as to Knowledge

Hartford concedes that it knew before July 2, 1976, that Levensaler had received $50,000.00 from Hope, but claims that it did not learn of the actual circumstances of the loan until September 9, 1976, when DiScuillo was

deposed by Hartford in another matter. Hartford concedes that it had some information before July 2, 1976, that Levensaler had borrowed $5,000.00 from Maysa, but claims that it was not able to document its information until after November 23, 1976, when its attorney came into possession of a copy of the CBT note executed by Maysa. Levensaler alleges that Hartford knew all operative facts about these matters well before July 2, 1976, from information available from 205(a) examinations in the Johnson bankruptcy. Hartford concedes that "what was known to its attorneys was known as well to it".

The major evidence of Hartford's knowledge of Levensaler's fraud is the testimony of Penrose Wolf, an officer of Hartford and an attorney. Wolf was questioned closely as to his knowledge of matters leading to the complaint to revoke Levensaler's discharge. The acknowledged purpose of this examination both on direct and on cross-examination by both parties was to elicit evidence relevant to the charges of knowledge and laches against Hartford. Wolf testified repeatedly that he took into consideration three items when he made his decision to seek revocation. These were the Hope Building loan, the Peter Maysa loan, and his learning of the formation of EES. Much testimony was elicited as to when Wolf first learned of these things. Other testimony concerned Wolf's knowledge of the arrangement between Levensaler and Weinberg to falsify purchase orders and invoices, and his knowledge of Levensaler's interest in the Ducci-Woods joint venture. Wolf testified that his and Hartford's knowledge of these matters was insufficient to justify taking legal action prior to July 2, 1976, the date of Levensaler's discharge in bankruptcy. Wolf conceded that there were extensive transcripts of 205(a) examinations of various witnesses in the Johnson bankruptcy available to Hartford prior to July 2, 1976. Wolf said that he had read, or tried to read, these transcripts as they became available. Wolf did not deny that these transcripts contained allusions to matters that subsequently became important to Hartford's allegations. Wolf's position throughout, however, was that

anything known to Hartford before July 2, 1976 was too insubstantial to support a complaint to revoke.

With respect to the Hope Building loan, Wolf testified that Hartford had no knowledge that the true nature of the Hope checks to Levensaler was a loan until September 9, 1976. On that day, Hartford deposed DiScuillo in a suit filed by Hope against Hartford on a performance bond. Until that deposition was taken, upon which occasion Hartford obtained a copy of the Hope letter to the joint venture detailing the first three months payback, Hartford had not known the meaning of the checks. It knew of the existence of the checks from answers dated May 17, 1976 to interrogatories received from Hope. These answers to interrogatories are in evidence and record the checks by amounts, date and payee. Wolf said that until September 9, 1976, Hartford knew nothing more than that about them. Upon cross-examination, Wolf did not recall reading testimony by one Spencer Johnson at a Johnson 205(a) examination on April 19, 1976 to the effect that Spencer Johnson had heard that Renzi and Levensaler had borrowed money from Hope against the job that they were performing for Hope. Wolf was also referred to a Johnson 205(a) examination of Maysa on May 14, 1976, when Maysa denied knowing anything about payments to Renzi or Levensaler in the Hope job, but Wolf did not recall having this section called to his attention. Upon redirect examination, Wolf testified that the Spencer Johnson testimony was not concrete evidence upon which to base a complaint to revoke a discharge since it was testimony by an individual who had heard what he testified to from other sources. Wolf characterized this as hearsay. Wolf testified that Spencer Johnson had never produced any documentation regarding the Hope Building loan and Levensaler, at his own Johnson 205(a) examination did not admit receiving any monies in connection with the Hope contract.

With respect to the Peter Maysa loan, Wolf testified that although Maysa had claimed that he loaned $5,000.00 to Levensaler at his 205(a) examination on May 14, 1976,

Levensaler, in February, 1976, had characterized the check to Maysa from Johnson as a bonus. Thus, prior to July 2, 1976, Wolf denied that Hartford had any "hard evidence" from either Maysa or Levensaler concerning the $5,000.00 transaction. Wolf said that he believed that in September or October, 1976, Hartford obtained a copy of the CBT note executed by Maysa, and that this verified Maysa's testimony. Subsequently, the date Hartford obtained this copy of the Maysa note was determined to be, in fact, November 23, 1976.

Wolf said that he finally decided to instruct Hartford's attorney to bring the instant action to revoke Levensaler's discharge upon learning of the incorporation of EES. He learned this when the attorney called to his attention the November issue of a commercial newspaper, recalled by him variously as the *Greater Hartford Business Review* or the *Greater Hartford Commercial Record*, which carried an article referring to the incorporation of EES in August, 1976. Upon investigation at the office of the Secretary of State, Hartford's attorneys learned that the paid-in capital was $40,000.00 and that Levensaler was president. Wolf said that he decided to act upon this information because when Levensaler had received his discharge in July, his schedules had shown "virtually no assets" and in the following month he was president of a new corporation with $40,000 paid-in capital. Wolf testified "It seems strange to me at least. To put it in context of the other things I then knew, as of November 1976, it provoked my decision, which I made and instructed counsel to file the petition". Upon cross-examination, Wolf conceded that he had not checked at the time whether Levensaler was the owner of EES as well as its president. He thought that the formation of EES, the Hope Building Loan, and the Peter Maysa loan was enough for Hartford to act upon.

Wolf testified extensively as to knowledge of the Economy false invoices. He conceded that Penna had given testimony about this matter at a Johnson 205(a) examination in April 1976, which raised the question of Economy

ever delivering the ordered material but insisted that Hartford was not able to confirm Levensaler's complicity in the Economy transaction until February 1978, when Hartford obtained the Johnson purchase order book and was able "to correlate these purchase orders with documents we had earlier seen or heard about, or to which there had been testimony".

As to Levensaler's failure to report an interest in the profits of work to be performed by Ducci or Ducci-Woods, Wolf denied having any conversations with the Kerins at the time of the Johnson shutdown or of discussing in any detail, with either Kerin, Levensaler's complicity in any bankruptcy fraud prior to July 2, 1976. Wolf denied having access to records of the joint venture, EES, or Levensaler prior to July 2, 1976. Upon cross-examination, Wolf stated that Hartford knew before July 1976, that the Economy claims were unsupported by evidence of delivery. He continued to insist, that despite hearsay and speculation in various Johnson 205(a) examinations, Hartford was unable to correlate this information until they obtained the Johnson purchase order book in February 1978. Wolf placed Hartford's claim for losses on the Johnson bonds at $2,312,526.00 as of June 29, 1979.

Wolf was recalled at the end of the trial as a witness for Levensaler and examined concerning correspondence which passed between Hartford, Economy, the bankruptcy court, and the trustee of Johnson in September and October, 1975 and September, 1976, to show that Hartford had concrete knowledge of Levensaler's wrongdoing prior to his discharge. A fair review of the testimony and these exhibits only discloses that there was great confusion and a seeming inability to tie down the myriad rumors, accusations, and investigations going on during this period.

B. Findings of Fact

On the evidence presented, the court finds that as to the Hope and Maysa loans, Hartford knew before July 2,

1976 that at certain Johnson 205(a) examinations testimony had been given to the effect that Levensaler had been loaned money by Hope and Maysa. Hartford knew that the testimony was conflicting with regard to both of these loans. It is equally clear that Hartford had no more than conflicting testimonial evidence until supplied on or about May 17, 1976 with the answers to interrogatories served on Hope requesting identification of Hope payments to the Renzi-Johnson joint venture or either member thereof. The answer bears out Wolf's testimony that they reveal only the amounts, date, and payee of the Levensaler checks. All that Hartford knew as of July 2, 1976, then, was that conflicting testimony had been given in regard to the Hope and Maysa transactions, and that there was evidence that Hope had issued checks to Levensaler. I find that Hartford lacked sufficient knowledge prior to discharge concerning the true nature of the Hope transaction. It first learned that this transaction constituted a loan to Levensaler at DiScuillo's deposition on September 9, 1976.

Hartford knew that Maysa's story concerning his taking of a loan from CBT was true no earlier than November 23, 1976, as appears from uncontroverted testimony at trial. Prior to that date, Hartford knew only that Levensaler and Maysa had told conflicting stories as to the Johnson $5,000.00 check issued to Maysa. I find that, in the language of §15, Hartford's knowledge of the Peter Maysa loan was gained since Levensaler's discharge was granted.

Wolf's testimony as to when he learned of the EES incorporation, and his actions thereupon, is unrefuted. No serious attempt was made to attack his testimony as to Hartford's lack of knowledge with respect to Levensaler's failure to report property, and the court finds that, far from knowing of Levensaler's interest in Ducci-Woods prior to July 2, 1976, Hartfore achieved this knowledge only at trial.

It is apparent that when Hartford and Economy entered into an agreement, in June 1976, that Economy would return funds paid to them on Johnson bonds, Hartford knew of the invalidity of the Economy claim prior to Levensaler's discharge. However, Wolf's testimony that Hartford was unable to tie in complicity on Levensaler's part until it obtained the Johnson purchase order book in February, 1978 is unrefuted, and the court finds that Hartford's knowledge of such complicity dates from that time.

VIII. CONCLUSIONS OF LAW

Having found, as a matter of fact, that Levensaler intentionally omitted required information from his schedules and failed to report or deliver property to his trustee, the court now considers the legal effect of these omissions and failures under §15 of the Bankruptcy Act.

A. Omissions from Schedules

Section 15(1) of the Bankruptcy Act provides that "the court may revoke a discharge . . . if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt. . . ." The tests to determine fraud under §15 are the same as those set forth in §14 of the Bankruptcy Act warranting *denial* of a discharge. Thus rule is clearly stated in *In The Matter of Hannan,* 127 F2d 894, 896 (7th Cir. 1942).

> It is our view that any fraud which will defeat a discharge under section 32 [§14 of the Bankruptcy Act] may be utilized to revoke a discharge under section 33 (§15] under the conditions imposed by the latter section. Such conditions are that the party seeking the revocation be not guilty of laches; that the application be filed within one year after the discharge has been granted, and that knowledge of the fraud has been acquired subsequent to the date of the discharge.

Section 14c provides that the court will deny discharge if it is

> satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under Title 18, United States Code, section 152; . . . .

An offense under 18 U.S.C. §152 is committed by one who

> knowingly and fraudulently makes a false declaration certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28 United States Code, in or in relation to any case under Title 11. . . .

Omissions from schedules have been held to violate §14c(1) and 18 U.S.C. §152 in a series of decisions by the court of appeals for this circuit. *U.S. v. Stone,* 282 F2d 547 (2nd Cir. 1960) cert. den. 364 U.S. 928 (1960); *In re Tabibian,* 289 F2d 793 (2nd Cir. 1961); *Avallone v. Gross,* 309 F2d 60 (2nd Cir. 1962).

In *Stone,* the bankrupt was convicted on two counts of bankruptcy crime in violation of 18 U.S.C. §152, for (1) concealing assets, and (2) making a false oath. The false oath consisted of failure to disclose repayment of loans. In answering item 10 on his schedules, the bankrupt listed various repayments of loans and then added "all as appeared on the books and records". The bankrupt then defended against other repayments of loans which he had omitted from his schedules, by claiming that the quoted language excused his omissions. The court responded as follows:

> Appellant's claim that any failure to include repayment of loans to Mrs. Stone in the answer to Item 10 would have been inconsequential in view of the reference made to the books and accounts, is plainly without merit; *the very purpose of the*

statement of affairs is to give dependable information without need of going further. U.S. v. Stone, supra at 553. (Emphasis supplied).

In *Tabibian*, another "false oath" case, the discharge of a bankrupt by the referee was reversed by the district court, but upheld by the court of appeals. In *Tabibian*, the bankrupt, at the first meeting of creditors, two weeks after he filed his schedules and answered "none" to the question of what transfers he had made during the preceding year, corrected this answer by stating that he had made two such transfers of motor vehicles. The court of appeals found that "at the first meeting of creditors, he testified openly and rather spontaneously as to both transactions involving the motor vehicles." *Tabibian, supra* at 795. The court also held that the referee's findings are to be upheld unless "clearly erroneous". Nonetheless, this was a close case as the following language suggests:

> The most difficult question presented concerns the bankrupt's "false oaths". Most of his misstatements were on totally irrelevant points concerning the wife's business, i.e. the date he began working for the corporation and the address of same. His apparent inability to tell the same story twice running may be ascribed more to confusion than to any conscious fraudulent design. The untruthful answer on the schedule of his affairs, denying any transfers in the year before bankruptcy is much more serious. The referee felt that the false answer in the petition was "cured" by his subsequent testimony at the first meeting of creditors. As a "rule of law", stated broadly, the referee was incorrect. "The very purpose of the statement of affairs is to give dependable information without need of going further." [Citing U.S. v. Stone] To warrant denial of a discharge, however, the misstatement must have been fraudulent; in determining the bankrupt's state of mind, the referee was entitled to consider

> the later disclosure as some evidence of innocent intent. Here the small size of the transaction, the brief interval between the statement and the first meeting, and the spontaneous nature of the disclosure coupled with fairly plausible explanations of the transfers themselves were enough to warrant the referee's finding. The referee observed Tabibian on the stand and had by far the best vantage point from which to measure the good faith of the bankrupt; . . . . *Id.*, at 796-797.

In *In re Robinson*, 506 F2d 1184 (2d Cir. 1974), the court construed the phrase "knowingly and fraudulently". In this case, the false oath alleged to violate 14c(1) and 18 U.S.C. §152 were oral statements at a first meeting of creditors rather than omissions from schedules. The court's analysis is, however, pertinent to the matter before me. The court noted that

> [i]n the Second Circuit we have held that "[t]he words of the statute requiring that the testimony be given 'knowingly and fraudulently' means no more than an 'intentional untruth in a matter material to the issue which is itself material' ". *Id.*, at 1187.

Robinson had first claimed that the referee could not have found fraudulent intent, citing *Tabibian*. The court concluded that the result in *Tabibian* was predicated on the failure of the bankrupt "to list inconsequential property interests" on his schedule of assets from which the trier could reasonably infer no fraudulent intent. Robinson's main argument was that his false statement was immaterial because a true statement would not have benefited his creditors, to which the court responded:

> We have consistently held, however, that materiality does not require a showing that the creditors were prejudiced by the false statements. (The materiality of the false oath will not depend

> on whether in fact the falsehood has been detrimental to the creditors). (Citations omitted) *Id.*, at 1188.

Levensaler's defense to the charge that he omitted the Hope Building loan from his schedule is that the omission was inadvertent and was cured by the subsequent amendment of his schedule. The court has found the facts to be contrary to Levensaler's assertion of forgetfulness, and thus his subsequent amendment fails to cure his original omission. *Tabibian, supra. In re Diorio,* 297 F. Supp. 842 (S.D. N.Y. 1968), *aff'd per curiam sub. nom., Diorio v. Kreisler-Borg Construction Co.,* 407 F2d 1330 (2nd Cir. 1969); *U.S. v. Diorio,* 451 F2d 21 (2d Cir. 1971), *cert. den.* 405 U.S. 955. In the *Diorio* civil case, a case involving objections to discharge under §14c(1) and 18 U.S.C. §152, the court observed:

> In arriving at the conclusion that the bankrupt's false statements were inadvertently made, the Referee took into account five factors. First, the bankrupt disclosed his half interest in "D" Corporation at the adjourned first meeting of creditors on December 19, 1966. *However, a false statement in schedules is not cured by the bankrupt's subsequent disclosure,* [citing *Tabibian*], and in this case the bankrupt's disclosure of his interest came more than a year after the schedules were filed on November 3, 1965, during which time investigation had unearthed proof of the bankrupt's interest. *In re Diorio, supra,* at 845 (Emphasis supplied).

When *Diorio* eventually reached the Second Circuit as a criminal appeal, the trial court's charge on the effect of subsequent disclosure of a previous omission, consistent with the civil holding, was sustained in the following language:

> The court's charge regarding appellant's recantation simply left to the jury the question whether the recantation was "prompted by an honest discovery of an earlier mistake" on the one hand or, on the other hand, "by the realization that the jig was up and that the falsity had already been uncovered or was about to be uncovered by others". This charge was proper in light of evidence that the Referee had asked appellant's attorney to submit the affidavit and a year later had asked appellant to appear for further interrogation, at which time disclosure of appellant's half ownership was made. Because a recantation does not in and of itself cure an original false statement under oath, [citing *U.S. v. Norris*, 300 U.S. 564 (1936)] the court necessarily had to explain the possible inferences. *U.S. v. Diorio, supra*, at 23.

In view of the fact that with respect to the Hope Building and Peter Maysa loans, the court has found that Levensaler omitted material information required to be filed under oath from his schedules and has seen no evidence of subsequent spontaneous disclosure of these omissions within a reasonable time, I hold as a matter of law, that in accordance with the logic of decisional law in this circuit, Levensaler's omissions were knowing and fraudulent.(14)

B. Failure to Report or Deliver Property

In 1970, a new subsection was added to §15 of the Bankruptcy Act by amendment, providing a separate ground for revocation of a discharge. Section 15 of the Bankruptcy Act, as amended, states that the court may revoke a discharge if it shall appear

> (2) that the bankrupt, before or after discharge, received or became entitled to receive property of

> any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee. . . .

The court is not aware of any case in the ten years since §15(2) was added to the Act which analyzes this ground for discharge.

The subsection is briefly discussed at 1A *Collier on* Bankruptcy 14th ed., par. 15.12A at 1510.

> Section 15(2) is somewhat more specific than §15(1) in that the former relates to property which rightfully is part of the bankrupt estate. Whether the bankrupt in fact received such property before or after the discharge is immaterial; the fact that he became entitled to such property is all that matters. Of course, either receipt or becoming entitled to receive may trigger the application of this provision.
>
> The ground for revocation will exist when, under the above facts, the bankrupt knowingly and fraudulently fails to inform the trustee of the property or fails to deliver such property to the trustee. This addition to §15 was to reduce the possibilities of abuse of the discharge by bankrupts and to increase the protection afforded to creditors. It will be, at least, somewhat easier for the court to order the revocation of a discharge when the facts are proven but the addition does nothing to supply the necessary information or factual requisites that must be met. The plaintiff will still have a rather difficult burden, particularly in those cases where there is a real attempt to defraud creditors by retaining property belonging to the estate.

The operative concept in both §15(1) and (2) appears to be the fraud of the bankrupt, and the same tests for fraud, e.g. materiality and permissible inference, apply under §15(2) as would apply under §15(1). Thus, the foregoing analysis of law in connection with omissions from schedules would apply to failure to report or deliver property. I have no doubt that given the findings of fact in this case with respect to Levensaler's retention of an interest in the profits of the Ducci-Woods joint venture, Levensaler's failure to report or deliver that interest is, by any standard, knowing and fraudulent.

C. The Motion for Leave to Amend Complaint

The complaint filed by Hartford on December 2, 1976 is entitled Action to Revoke Discharge of the Bankrupt. The first paragraph of the complaint alleges that the action arose "under Section 15 of the United States Bankruptcy Act and Bankruptcy Rule 701(4) . . ." Rule 701(4) designates a proceeding to "revoke a discharge" as an adversary proceeding and thus subject to the rules thereto applying. On December 30, 1976, Levensaler filed his answer. On November 28, 1978, shortly before the date scheduled for trial, Levensaler filed a "Motion For A Bifurcated Hearing on The Standing of Plaintiff to Maintain Its Action to Revoke Discharge of Bankrupt" and alleged, *inter alia*,

> 5. Said failure of the plaintiff to act before December 2, 1976, although it had notice of the bankrupt's actions from April 30, 1976 onward, makes the plaintiff guilty of laches.
>
> 6. Pursuant to §15 of the Bankruptcy Act (U.S.C. Title 11, Chapter III, Section 33), plaintiff is required to show that it had not been guilty of laches before it becomes entitled to seek a revocation of a discharge in bankruptcy which the plaintiff has not even pleaded in its complaint.

That motion was denied, as previously noted in this memorandum.

During the trial, testimony on the issue of laches was offered by Hartford and allowed by the court, after objection, as being within the parameters of the complaint. After the trial, Hartford filed a "Motion for Leave to Amend Complaint", along with its reply brief. This motion to amend seeks to add the following paragraphs to the original complaint.

> 11. The complainant has not been guilty of laches.
>
> 12. Complainant did not acquire knowledge of the bankrupt's fraud until after his discharge.
>
> 13. The bankrupt's discharge was not warranted by the facts.

As will be observed by comparing these paragraphs with §15, the proposed amendment does no more than track the language of the statute. No new grounds or issues are raised therein. Hartford's purpose in proposing this amendment is stated in its brief accompanying this motion as follows:

> [I]n the course of proceedings arising out of the complaint, questions have been raised about laches on the part of the complainant. Accordingly, in order to permit discussion of such questions in their proper context, complainant has filed a motion for leave to amend its complaint. The amendment would have the complaint assert directly, and not merely by inference, that the complainant was not guilty of laches when it filed its request for revocation of the bankrupt's discharge.

Hartford cites Rule 15, FRCP, made applicable to bankruptcy proceedings by Bankruptcy Rule 715, which states "... a party may amend his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires", as the basis for the court to allow the requested amendments.

The issue of laches has been present and discussed in this case from the beginning. Levensaler specifically moved for a bifurcated trial in order to resolve this issue before any other issues were addressed. The court, over objection, allowed testimony concerning laches under the state of the pleadings as they existed at the time the testimony was offered. Based on the rulings made during the trial and the procedural history of the case, I conclude that denying Hartford's motion neither prejudices Hartford nor avails Levensaler. In short, when Hartford invoked §15 of the Bankruptcy Act as the basis for its prayer for relief, all of the essential or operative elements stated in §15 became and remained a part of this case.(15) There is, therefore, no reason to allow an amendment of the complaint "to permit discussion of such questions in their proper context". The motion of Hartford is denied. The logic leading to such denial further leads to a denial of motions made at trial, on Levensaler's behalf, to strike testimony relevant to the laches issue.

D. Knowledge and Laches

In determining the timeliness of Hartford's action in filing its complaint to revoke Levensaler's discharge under §15, the questions to be resolved are two. First did the information available to Hartford before July 2, 1976, concerning the frauds in the complaint, constitute such knowledge as to render this court without jurisdiction to determine the merits of Hartford's complaint? If the answer to the first question is that Hartford did not have such knowledge, then, second, did Hartford, upon learning of the frauds after July 2, 1976, so delay their application for revocation as to be guilty of laches?

The parties have staked out understandably mutually exclusive positions with respect to the §15 requirement that knowledge of an alleged fraud must come to the plaintiff after discharge. Levensaler alleges that *In re Bates,* 27 Fed. 604 (S.D. N.Y. 1886) supports his contention that the applicant for a revocation must be ignorant of any of the grounds raised for avoiding discharge prior to the discharge. Levensaler claims that the cases support the doctrine that a court will be satisfied that the applicant has prior knowledge if the applicant has strong suspicions. In effect, Levensaler claims that for §15 purposes, suspicion equals knowledge.(16) This is an overbroad reading of very limited case law. To accept such a reading would require an applicant to bring a complaint under §14 on the strength of suspicion only. Under this theory, if he does not, then even if he later attains more concrete knowledge, the fact that he had an earlier suspicion would preclude an action under §15. It is contrary to our jurisprudence that an action must be brought on suspicion lest the cause of action be forever lost. Much more would be needed in the way of precedent than is presented by Levensaler to sustain this proposition. The court, having found as a matter of fact that Hartford knew only of rumors, hearsay, conflicting testimony, and the existence of certain checks from Hope to Levensaler prior to July 2, 1976, now holds as a matter of law that such information was insufficient to bar Hartford's action under §15. Whatever suspicions Hartford may have harbored that Levensaler had fraudulently omitted certain required information from his Statement of Affairs, prior to July 2, 1976, they had insufficient knowledge to enable them to make proper allegations in their complaint. The court holds that knowledge of Levensaler's fraudulent omissions from schedules and failure to report property sufficient to sustain a denial of discharge under §14 of the Bankruptcy Act came to Hartford only after Levensaler's discharge was granted, thus meeting the threshold requirement of §15.(17)

Cases on laches vary widely in matter and result, but it is fair to say that they generally support the conclusion of

a case cited by Levensaler, *Sworob v. Harris,* 451 F. Supp. 96, (E.D. Pa. 1978).

> Laches conceptualizes the inequity which would result if a stale claim were permitted to be enforced; its application is left to the sound discretion of the trial judge. (citation omitted). Laches requires two elements, inexcusable delay in instituting suit and prejudice resulting from such delay. *Id.* at 101.

The doctrine of laches is designed to promote diligence on the part of the plaintiff. In *City of Davis v. Coleman,* 521 F2d 661, 667 (9th Cir. 1975), the court held that

> Laches requires more than delay; it requires a lack of diligence. (citation omitted). An indispensable element of lack of diligence is knowledge or reason to know of the legal right, assertion of which is 'delayed'.

The court has held, *supra,* that Hartford lacked sufficient knowledge of the facts underlying its legal grounds to seek revocation before July 2, 1976. The knowledge upon which it depended for filing its complaint came to Hartford in three stages. It "knew" of the Hope loan after September 9, 1976, and of the Maysa loan after November 23, 1976. It knew of the formation of EES in November, 1976. Thus, Hartford may be said to have delayed, at most, from September 9, 1976 to December 2, 1976, when the complaint herein was filed. The question with respect to laches is, as noted in *Sworob, supra,* two-pronged. If there was delay, was it inexcusable? If inexcusable, was there prejudice to the defendant thereby?

Hartford argues that its behavior from September 9 to December a period of less than three months, could not be characterized as sleeping on its rights. Noting that after November 23, 1976, it moved rapidly to file its complaint on December 2, Hartford claims it exercised due diligence

upon gaining knowledge of the frauds it alleges. The court agrees. The statute grants a year for filing an action to revoke, and in a situation where investigations were ongoing, a period of slightly less than three months after acquiring knowledge of one ground for revocation cannot be considered lack of due diligence. Hartford did not stand idly by or sleep on its rights during this period, but continued to seek evidence establishing its right to contest Levensaler's discharge.

Even if Hartford's failure to file its complaint between September 9 and December 2, 1976, were a failure of due diligence, and the court has held that it was not, Levensaler would still have to show that he was prejudiced by the delay and this he has not attempted to do. There is no reason to believe such prejudice was incurred. Levensaler was well aware that investigations were proceeding, as a result of the Johnson bankruptcy, throughout the year preceding his filing of personal bankruptcy and his discharge. In the face of Spencer Johnson's 205(a) testimony on April 19, 1976 disclosing a rumor of the Hope loan, Levensaler filed his petition and faulty schedules on April 30, 1976. He never sought to amend his schedules until January, 1977, after Hartford had filed its complaint in the instant action. Levensaler was not prejudiced by Hartford's failure to file the application to revoke his discharge until December 2, 1976.

The court holds that the matters alleged in paragraphs 9 and 10 of the complaint, i.e. the Hope Building and Peter Maysa loans, the the conspiracy, have been proven by a fair preponderance of the evidence. The court further holds that Hartford has met the requirements of §15, that its knowledge of Levensaler's fraud was gained subsequent to discharge, and that Hartford is not guilty of laches. In consequence of this, Levensaler's Motion to Dismiss is denied, and Hartford's complaint to revoke Levensaler's discharge is granted. The discharge is hereby revoked.

This Memorandum shall constitute Findings of Fact and Conclusions of Law pursuant to Rule 752 of the Rules of Bankruptcy Procedure. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 10th day of June, 1980.

/s/ Robert L. Krechevsky
ROBERT L. KRECHEVSKY
UNITED STATES
BANKRUPTCY JUDGE

NOTES

(1) On November 1, 1978, Krechevsky, B.J. succeeded Seidman, B.J. as the court.

(2) Section 15 — *Discharges, When Revoked.* The court may revoke a discharge upon the application of a creditor, the trustee, the United States Attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

(3) Hartford had furnished the surety bond for Johnson in the Academic Building #2 contract.

(4) Bankruptcy Rule 205(a) — *Examination on Application.* Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise permits.

(5) Section 11 of the bankruptcy petition reads, "*Loans Repaid* — What repayment on loans in whole or in part have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan, and when received, the amount and dates of payments, and, if the lender is a relative, the relationship.)"

(6) Levensaler borrowed this money personally presumably because the purposes for which at least some of it were to be employed were improper corporate payments, and disbursement of funds for such purposes could not be allowed to show up on the Johnson books.

(7) Alternatively (as in the case of the Hope loan, p.10 *supra*), Levensaler failed to list either Johnson as a creditor in the amount of $5,000.00, for the funds Johnson made available to pay off Levensaler's personal loan, or Maysa as a creditor to whom he was indebted for $5,000.00. While the finding as made by the court credits the testimony of Maysa and discredits the Levensaler testimony, it is obvious that no matter which Levensaler story were to be accepted, his voluntary petition utterly failed to provide the information required to be disclosed under penalty of perjury.

(8) In general, William's testimony was discursive, confusing and sometimes contradictory. The relatively straightforward presentation of his testimony that follows is compressed from over 400 typescript pages of testimony.

(9) Later in the trial, Arlene Cellotto, presently an attorney in the United States Department of Labor in Washington, D.C., testified that in 1975, she was a law student who worked that summer as a law clerk at Levensaler's attorney's law office. She stated that she accompanied him to Johnson to get information for the bankruptcy schedules which were in preparation at that time. She was present, she stated, at all times when Cusumano was questioned about information for the schedules, and no comment took place as described by Cusumano concerning assets that "would disappear". The court is convinced that Attorney Cellotto's version of the disputed incident is correct and that Cusumano was confused as to this incident.

(10) In terms of joint venture work only, DEC wound up with 83% of the total profit by this method, and WEC 17%.

(11) Wolf's further testimony related entirely to the issues of Hartford's knowledge of Levensaler's alleged wrongdoing, and the possibility of laches. This testimony will be summarized and discussed in connection with the issues of knowledge and laches in Part VII of this memorandum.

(12) Hartford made yet further requests for findings of fact with respect to alleged wrongdoing by Levensaler. Specifically, Hartford asks that the court find the following: (1) that Levensaler withdrew funds from the Johnson checking account to repay a bank loan cosigned by his wife in order to insulate family property from liability; (2) that Levensaler withdrew $60,000 illegally from the Johnson pension fund in connection with said loan repayment; (3) that Levensaler paid himself $30,000 from the Johnson pension fund without proper authorization; (4) that Levensaler earned $80,000 in

1975, had $27,000 in a safety deposit box as of December 31, 1975, and had $30,000 from the Johnson pension fund, yet claimed his assets were $1.00 on his bankruptcy schedule; (5) that Levensaler owned an interest in property at St. Maarten in the Netherlands Antilles in 1976 but did not disclose this on his schedules; (6) that Levensaler, in a financial statement to the Southington Bank and Trust Company dated March 26, 1975 stated that his assets totalled $998,400.00, including real estate worth $200,000.00, yet none of the $200,000.00 in real estate is included in his bankruptcy schedules of April 30, 1976; (7) that Levensaler arranged a transfer of certain Johnson vehicles (bucket trucks and a truck tractor) to DEC for no apparent consideration. The court notes and has considered these requests for findings, but declines to draw the requested conclusions. The findings are either indefinitely stated, inadequately supported, or lacking any reasonable relationship to matters alleged in the complaint.

(13) A close reading of the statute indicates that the knowledge element applies only to the §15(1) fraud allegation, with no such element required in the §15(2) undisclosed property allegation. The parties, however, have not made this distinction and neither will the court.

(14) "Successful administration of the Bankruptcy Act hangs heavily on the veracity of statements made by the bankrupt, cf. *United States v. Stone*, 282 F2d 547, 553 (2 Cir. 1960). Statements called for in the schedules, or made under oath in answer to questions propounded during the bankrupt's examination or otherwise, must be regarded as serious business; reckless indifference to the truth, which is the kindest attitude that can be taken toward Diorio's affidavit, is the equivalent of fraud." *Diorio v. Kreisler Borg Construction Co., supra* at 1331.

(15) Rule 8(a)(2), FRCP, requires "a short and plain statement of the claim showing the pleader is entitled to relief".*Conley v. Gibson*, 355 U.S. 41 (1957), at 47-48. Rule 8 is made applicable to bankruptcy proceedings by Bankruptcy Rule 708. Levensaler's reliance upon *In re Cuthbertson*, 202 Fed. 266 (D. S.D. 1912) is inapposite. We do not have a case where the applicant for a revocation of a discharge did not seek to prove freedom from laches.

(16) "Without question, the Plaintiff was strongly suspicious of such fraudulent activity, it was conscious of it, was aware of it, was informed of it and, therefore, had knowledge of the purported fraud as set forth in Section 15(1) of the Act." Levensaler main brief, p. 16.

(17) Indeed, Levensaler is in the position of asserting that Hartford should be held accountable for knowing that which Levensaler says, in another context, Hartford could not know because it (the fraud) did not exist.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In The Matter Of:

KENNETH M. LEVENSALER, *Bankrupt* — In Bankruptcy

No. H-76-447

HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Plaintiff*

V.

KENNETH M. LEVENSALER, BANKRUPT, *Defendant*

CORRECTED MEMORANDUM AND ORDER

On Page 62, the 16th through 20th lines from the top of the page of the Memorandum and Order dated June 10, 1980 are deleted and in place thereof the following is substituted:

> knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding.... Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

Dated at Hartford, Connecticut, this 10th day of September, 1980.

/s/ Robert L. Krechevsky

ROBERT L. KRECHEVSKY
UNITED STATES
BANKRUPTCY JUDGE

FILED SEP. 10, 1980
ROBERT L. KRECHEVSKY
BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

KENNETH M. LEVENSALER:

v. : CIVIL ACTION
NO. H 80-722

HARTFORD ACCIDENT AND:
INDEMNITY COMPANY

RULING ON APPEAL

This is an appeal pursuant to Rule 801 of the Bankruptcy Rules, from a decision by the Bankruptcy Court (Krechevsky, J.) revoking the discharge in bankruptcy of Kenneth M. Levensaler, defendant below and appellant in this court.

I.

Until 1975, Kenneth M. Levensaler was president and sole stockholder of the Newington, Connecticut electrical contracting firm of Johnson Electrical Co., Inc. ("Johnson Co."). At some time during 1975, Johnson Co. found itself financially pressed. By the middle of that year, many of its suppliers were refusing to extend it credit, and in July 1975 its major financing source, the Connecticut Bank & Trust Co. ("CBT") demanded payment on a debt in excess of $1,000,000. With Johnson Co's financial picture darkening, Hartford Accident and Indemnity Co. ("Hartford"), which had written performance bonds for many of Johnson Co.'s contracts, filed an involuntary petition in bankruptcy against Johnson Co. on September 22, 1975. On September 25, 1975, Johnson Co. filed its own petition for an arrangement with its creditors under Chapter XI of the Bankrupt-

cy Act. However, on October 20, 1975, the company gave up its struggle and consented to a Chapter VII administration of its affairs; accordingly, the winding up of Johnson Co.'s business has proceeded as a liquidation since then.

Levensaler had personally guaranteed Johnson Co.'s liability on several of the bonds written by Hartford. The collapse of Johnson Co. left Levensaler's personal financial position precarious, and it too rapidly crumbled. On April 30, 1976, Levensaler filed his own petition in bankruptcy under Chapter VII. He was discharged in bankruptcy on July 2, 1976.

On December 2, 1976, Hartford brought the present action by filing a complaint seeking revocation of Levensaler's discharge. After first invoking the jurisdiction of the court under former § 15 of the Bankruptcy Act, 11 U.S.C. § 33 (Complaint, par. 1),[1] Hartford stated that it had received notice of Levensaler's pending discharge on June 28, 1976, which discharge was thereafter ordered on July 2, 1976 (*id.*, pars. 3-4), leaving Hartford with what it alleged was "insufficient time in which to object to the discharge," *id.*, par. 5. Hartford then noted that it had filed a proof of claim with the court on September 10, 1976 (*id.*, par. 6) and, by letter, had suggested that the trustee in bankruptcy consider seeking revocation (*id.*, par. 7).

The body of the complaint then lists the bases for Hartford's belief that revocation is warranted: first, from a July 21, 1976 article in the Hartford *Times* and from inquiries by its attorneys, Hartford had learned that the United States Attorney for the District of Connecticut had impanelled a grand jury to investigate charges of criminal fraud allegedly committed by Levensaler during the course of the Johnson Co. and his own personal bankruptcies (Complaint, par. 9c-d); second, from depositions taken after July 2, 1976 in a different matter, Hartford had learned of certain payments said to have been made by Hope Building Co., Inc. ("Hope Co.") to Levensaler that, it appeared to Hartford, ought to have been made to Johnson

Co. and that, according to Hartford, Levensaler had not reported when he filed his voluntary petition (*id.*, par. 9e-h); from an examination pursuant to Rule 205(a) of the Bankruptcy Rules, the transcript of which Hartford stated it did not receive until after July 2, 1976, Hartford learned of what it took to be another scheme to transfer Johnson Co. funds to Levensaler, in this case through the mediation of one Peter P. Maysa (*id.*, par. 9i-k); and, finally, Hartford alleged additional concerns about Levensaler's ongoing financial transactions, those concerns having apparently been crystallized by Levensaler's organization in August 1976 (about one month after his discharge in bankruptcy) of a new company, Electrical Energy Systems Corp. ("EES"), with $40,000 of paid-in capital (*id.*, par. 10).

After numerous extended continuances sought by and granted to Levensaler, trial of the case was finally begun on December 1, 1978. That court trial lasted three-quarters of a year, consuming twenty-nine days of trial time. Twenty-eight witnesses testified, many of them on several different occasions. In all, the record of the trial, including testimony and arguments of counsel, approaches 5,000 pages.

Post-trial proceedings necessitated further delays, and several extensions of time were accorded the parties before proposed findings of fact and conclusions of law were ultimately submitted. On June 10, 1980, Judge Krechevsky filed his seventy-three page Memorandum and Order ("Mem."), in which he granted Hartford's complaint and revoked Levensaler's discharge.

On July 9, 1980, Levensaler filed a timely notice of appeal to this court.[2]

II.

The decision of the trial court reflects findings of fact with respect to four issues in dispute: first, what the court

termed the "Hope Building Loan," second, what it termed the "Maysa Loan," third, the "Conspiracy," and, finally, the question — in some part an issue of fact — of whether Hartford's complaint, filed five months after Levensaler's discharge, should be barred by laches.

The Hope Building Loan arose out of a joint venture formed in 1973 between Johnson Co. and Renzi Electric Co., whose president was Bernard Renzi. The venture was formed to undertake a subcontract in Newport, Rhode Island; the prime contractor on that job was Hope Co., whose president was Robert B. DiScuillo. It is undisputed that sometime before March 1974, DiScuillo, Renzi, and Levensaler negotiated some sort of loan agreement. The trial court found, in a nutshell, that half of that loan was supposed to go from Hope Co. to Johnson Co., but that in reality those funds were consumed by Levensaler personally, while being paid back by Johnson Co. through adjustments of Johnson Co.'s account with Hope Co. under the terms of the joint venture's subcontract. Mem., 7-12. Hartford claimed that Levensaler had diverted corporate funds to pay off his personal debt; Levensaler denied that, claiming that the debt remained outstanding. The trial court found that the former contention had been proved, and that Levensaler therefore owed the amount of the loan to either the joint venture or Johnson Co., a debt omitted from the creditor schedules attached to the voluntary petition he submitted on April 30, 1976. Mem., 10. But, as the court pointed out, even if Levensaler's account were credited, his schedules would still have been defective, because the debt to Hope Co. was not mentioned. Mem., 11-12. The court concluded that Levensaler had intentionally concealed the existence and circumstances of the Hope Building Loan when he filed his petition. The court further found that, when Levensaler filed an Application for Leave to Amend Schedules on January 25, 1977 to reflect the Hope Building Loan, he did so only because Hartford had already discovered the irregularity and raised it in its complaint in this action. Mem., 12.

The Maysa Loan was, the court found, a loan made to Levensaler by Maysa in 1974, when Maysa was project manager on a contract undertaken by Johnson Co. in West Hartford, Connecticut. Maysa himself had, at Levensaler's behest, borrowed the funds in question from CBT, and Maysa then transferred those funds to Levensaler personally. However, Maysa was repaid, the court found, by a sham "bonus" issued out of Johnson Co.'s corporate funds. Mem., 14-16. Levensaler's explanation of these transfers apparently shifted over time. At trial, he denied that there had ever been any loan at all. In his proposed findings of fact, however, he adopted a position closer to his account of the Hope Building Loan, contending that he simply had an outstanding debt to Maysa. As with the Hope Building Loan, though, that debt was not indicated on Levensaler's schedules. Mem., 16 n.7. The trial court found that Levensaler knowingly omitted recording his indebtedness, whether to Maysa or to Johnson Co. (for having paid Maysa back), from his schedules. Mem., 15-16.

The court then turned, at length, to what it called the "conspiracy." The following synopsis does not do justice to the trial court's painstakingly detailed forty-page account of the evidence received, findings of fact made, and conclusions of law drawn concerning this complex scheme. For our purposes, it suffices to note the court's finding that, as it became clear that Johnson Co. could not survive, Levensaler concocted an elaborate plan to ensure that those contracts upon which Johnson Co. defaulted would be transferred to Levensaler's associates, who would then reward Levensaler by allowing him to continue to participate in income from those contracts. Mem., 16-54. The entities crucial for the scheme's success were another contracting company, Ducci Electrical Co., Inc. ("Ducci Co."); a company formed by the former vice-president of Johnson Co., James Woods, shortly before Johnson Co. was forced into bankruptcy, Woods Electrical Co., Inc. ("Woods Co."); a joint venture between Ducci Co. and Woods Co.; and a new corporation, EES. EES, formed a month after Levensaler's discharge, was jointly owned by E. John Ducci,

president of Ducci Co., and Levensaler's wife, Ann Levensaler, each of whom was declared a 50% stockholder. Ducci paid in $20,000 of his own money and loaned Ann Levensaler $20,000.00 for her contribution; it appears that that loan has never been repaid. Mem., 49. The president, treasurer, and operating manager of EES was Kenneth Levensaler. It should also be noted that from August 1975 (a month before the Johnson Co. bankruptcy) until March 1976 (a month before Levensaler initiated his personal bankruptcy), Levensaler was employed as a consultant by Ducci Co. and paid $2,500 per month. Mem., 41. EES, as already noted, was formed in August 1976.

After minutely considering, weighing, and analyzing the testimony of fifteen witnesses concerning this tangle of corporate interweavings, the court concluded that, while most of Hartford's allegations concerning the "conspiracy" had not been satisfactorily proved, Hartford had established the existence and operation of a scheme under which property was conveyed to Levensaler from the income of the joint venture of Ducci Co. and Woods Co. and that that conveyance took place, in part, through the medium of a "paper loan" to Ann Levensaler. Mem., 46-50. The court thus found that, at the time he filed his petition, Levensaler had a property interest that he failed to disclose. Mem., 46.

While the court incidentally found that other instances of unscrupulous dealing by Levensaler had been proved, Mem. 53, the court was not satisfied that Hartford had shown, *inter alia*, that Levensaler had an undisclosed interest in Woods Co. or that Levensaler had diverted Johnson Co. inventory, with the connivance of Ducci Co., to EES, thus defrauding Johnson Co.'s (as well as Levensaler's own) creditors. Mem., 50-54.

The final set of fact issues presented to the Bankruptcy Court concerned Levensaler's argument that Hartford's claim was barred by the doctrine of laches. With respect to the Hope Building Loan, the court found that, until

September 9, 1976 (two months after Levensaler's discharge), Hartford knew of only vague, contradictory hearsay evidence that Levensaler had received a loan from Hope Co., and that on September 9, 1976, after a deposition of DiScuillo in a different matter, Hartford learned for the first time of the true nature of the loan and its repayment. Mem., 60. The court also found that Hartford did not learn of the Maysa loan until its attorney came into possession of the CBT note executed by Maysa; that happened on November 23, 1976. Mem., 56, 60. Furthermore, the court found that it was certain that Hartford had no inkling of the creation of EES until November 1976; of course, the formation of EES did not occur until after Levensaler's discharge. Mem., 58-59, 61. The court concluded that Hartford's complaint was not barred by laches.

III.

On his appeal, Levensaler presents six issues to this court, which shall be considered *seriatim*. These issues, in appellant's words, are: (a) whether the court erred in failing to dismiss the complaint due to lack of jurisdiction; (b) whether the court erred in concluding that Hartford was not guilty of laches and lacked knowledge of fraud prior to discharge; (c) whether the court erred in concluding that Hartford had satisfied the required burden of proof in proving the allegations of the complaint; (d) whether the court erred in refusing to grant Levensaler's motion to dismiss and to bifurcate; (e) whether the court erred in finding and concluding that Levensaler had an interest in the profits of the Ducci-Woods joint venture, which he failed to report to the trustee; and (f) whether the court erred in failing to rule on motions to strike evidence.

A.

Levensaler argues that Hartford's complaint is defective in several respects. Hartford, Levensaler claims, "has

failed to allege in its Complaint that knowledge of the Defendant's fraud came to the Plaintiff subsequent to the date of discharge. Further, the Complaint fails to set forth allegations regarding freedom from laches. Finally, the Complaint lacks a statement that the actual facts did not warrant a discharge." (Appellant-Defendant's Brief (filed March 21, 1981) ("Appellant's Brief"), at 8-9.) Appellant contends that, under § 15 of the Bankruptcy Act, specific allegations in the complaint are a predicate to the court's jurisdiction. Appellant's Brief, at 10. It should be noted that, after trial before the Bankruptcy Court, Hartford moved to amend its complaint to obviate Levensaler's objection; that motion was denied by the Bankruptcy Court on the theory that the existing complaint satisfied Rule 8(a)(2), Fed R. Civ. P., as interpreted by *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). Mem., 67-69.

Whether the full liberality of Rule 8(a)(2) is available to the petitioner under § 15 is, however, questionable. Historically, federal courts have demanded something more from such a petitioner, fearing that casual revocations would disorder the bankruptcy system, impede the efforts of debtors to achieve fresh starts in business, and give creditors unwarranted retrials before appellate proceedings could be commenced. *See generally Solove v. Chase Manhattan Bank*, 338 F.2d 874 (5th Cir. 1968). It has been reasonably said that a "creditor who asks that a discharge be revoked is required to make a fair showing that the actual facts did not warrant discharge, that if the matter is reopened there is reason to believe that the bankrupt will not win a discharge. In this respect the petition is like a motion to open a default and should embody the equivalent of an affidavit of merits." *In re D'Alessio*, 24 F. Supp. 563, 564 (S.D. N.Y. 1938).

It does not follow, however, that § 15 sets up shibboleths to be repeated mechanically in every petition for revocation; nor does it follow that jurisdiction depends on the recitation of such phrases. The point of § 15 is that certain information should be presented to the court's attention, not that certain verbal formulae are sacrosanct.

The present court recognized the difference between form and substance in pleading under § 15 long before the arrival of the Federal Rules of Civil Procedure. In a revocation case, Judge Platt wrote:

> There are two reasons given for the demurrer: (1) That it is not alleged that the actual facts did not warrant the bankrupt's discharge. . . .
>
> The first cause of demurrer is without merit. If the facts set forth would have warranted the judge in refusing the discharge, there is no force in asking that the petitioners, after presenting them in detail, should assert the conclusion of law, which it would remain the duty of the court to infer from the facts.

In re Toothaker Bros., 128 F. 187, 188 (D.C. Conn. 1904). *Toothaker* should also make it apparent that it is not the rule that the pleading requirements of § 15 are jurisdictional.

Appellant's contention to the contrary is based on multiple misreadings of the law. For example, appellant states that requiring strict pleading under § 15 as a predicate to jurisdiction "is no different than requiring that a petitioner plead diversity of citizenship to confer jurisdiction upon the federal court." Appellant's Brief, at 10. But a properly pleaded statement of diversity of citizenship is not a prerequisite to federal jurisdiction where facts set forth in the complaint will allow a court to infer the existence of diversity. *See, e.g., DeVries v. Starr*, 393 F.2d 9, 11 (10th Cir. 1968).

More important, appellant has cited no recent authority for the proposition that strict compliance with § 15, to the extent of repeating the language of the statute, is necessary to create jurisdiction. Appellant does state that *In re Leach*, 197 F. Supp. 513 (W.D. Ark. 1961), so holds. Appellant's Brief, at 10. But appellant's contention is based on a drastic misreading of *Leach*. The *Leach* court

was concerned with the practical question of when the complaining creditor in a revocation proceeding had learned of the putative fraud; in support of its point that "it is essential that knowledge of the fraud must come to the petitioner subsequent to the granting of the discharge," *Leach, supra*, 197 F. Supp. at 520, the court quoted at length from *In re Cuthbertson*, 202 F. 266 (D.C. S.D. 1912). But it is excessive to claim that the *Leach* court thereby "held" what *Cuthbertson* held. As it happens, *Leach* does not involve a pleading issue at all, because in that case the petitioner admitted having had knowledge of the fraud one month before the discharge. *Leach, supra*, 197 F. Supp. at 520. It should also be remarked, in passing, that *Leach* provides no support for another proposition appellant attributes to it, *viz.*, that "[d]ischarge of a bankrupt is to be construed liberally," Appellant's Brief, at 8.

Appellant argues that if a litigant is allowed to prove facts not specifically alleged in the complaint in order to establish the court's jurisdiction, then "carte blanche authority [is given] to a litigant to present evidence on issues not raised by the Complaint," *id.* at 10. It should be obvious, however, that allowing a litigant to prove facts pertinent to establishing the court's jurisdiction is not the same as allowing all litigants to prove whatever they wish, regardless of pleadings.

With the foregoing in mind, it is apparent the complaint in this case is in no way defective. Though the language of § 15 is not tracked, all of the allegations upon which appellant has concentrated may easily be inferred. It is apparent that pars. 9 and 10 set forth allegations of fraud and of when Hartford learned of the supposed fraud and that proof of those allegations would lead to the conclusions that Hartford was not guilty of laches and that the discharge was not warranted. As for appellant's evident concern that the complaint fails to allege a basis for Hartford's standing, the preamble of the complaint alleges that: "The Complainant, Hartford Accident and Indemnity Company, is a major creditor of the Bankrupt, Kenneth

M. Levensaler," Complaint, at 1. No more precise allegation is required.

Appellant's glancing reference to Rule 9(b), Fed. R. Civ. P., Appellant's Brief, at 11, may be addressed by observing, first, that the complaint does not "merely invok[e] Section 15 of the Act," *id.*, but rather contains numerous particularized allegations; second, that Rule 9(b) pertains to allegations concerning the underlying fraud, not to pleading such preliminary matters as plaintiff's freedom from laches; and third, that Rule 9(b) is not jurisdictional, making failure to raise a timely objection an effective waiver of the issue. 2A Moore's Federal Practice, par. 9.03 at 9-35 (1980). Nothing on the record of this appeal suggests that Levensaler ever objected to the complaint under Rule 9(b) before the Bankruptcy Court.

To recapitulate briefly: the complaint adequately sets forth such facts as § 15 of the Bankruptcy Act requires a petition thereunder to state. Strict compliance with the specific wording of § 15 is not required for jurisdiction. Recent cases that have emphasized stringent requirements have done so to ensure that adequate facts and allegations thereof are pleaded and proved, *see, e.g., Solove v. Chase Manhattan Bank, supra,* 388 F.2d at 879, but it does not appear that any modern court has embraced the view of *In re Cuthbertson, supra,* that the petition must set forth standard conclusions of law. Accordingly, the complaint is sufficient in all respects, and the Bankruptcy Court did not err in failing to dismiss the complaint for lack of jurisdiction.

B.

Appellant contends that appellee knew of the alleged fraud before appellant's discharge and that appellee's claim is therefore barred by the doctrine of laches.

In responding to this argument, appellee has contended that "[a]ppellant is asking this Court to ignore the plain edict of Rule 810" of the Bankruptcy Rules, Appellee's Brief (filed May 18, 1981), at 21. Rule 810 provides, in pertinent part: "The [district] court shall accept the [bankruptcy court's] findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the [bankruptcy court] to judge the credibility of the witnesses."

In rejoinder, appellant states: "The Appellee misses the point. The Defendant *is* claiming that the referee's findings in this regard *are* clearly erroneous. They are erroneous because the referee, in defining knowledge, applied the law incorrectly." Appellant's Reply Brief (filed June 1, 1981), at 8. With the argument thus clarified, appellant's claim of error is manifest. The Bankruptcy Court found that, as of July 2, 1976, the date of Levensaler's discharge, Hartford had at most "suspicions," Mem., 70, concerning fraud, and that those suspicions, if any, gave Hartford "insufficient knowledge," *id.,* to support proper objections to discharge. Appellant's dissent is direct: "[T]here is no such thing as insufficient knowledge when it comes to the issue of laches. One is either ignorant of the facts or has knowledge of them, even if the knowledge is limited to suspicion," Appellant's Brief, at 31, *citing Appeal of Moynagh,* 560 F.2d 1028 (1st Cir. 1977); *In re Leach, supra; Wood v. Carpenter,* 101 U.S. 135 (1879).

Appeal of Moynagh is not, however, a helpful case, for the issue in the cited decision did not involve pre-discharge knowledge or laches. Thus, the published opinion refers only obliquely to the issue deemed critical by Levensaler. One Moynagh had been discharged in bankruptcy, and a creditor sought revocation of the discharge. With respect to that petition all that we are told is that:

> The Referee allowed in part Moynagh's motion for summary judgment, having found that "[a]s to all of those items that there was

knowledge, should have known, or apparently strong suspicion . . . there is no basis to revoke discharge under Section 15. . . ."

Appeal of Moynagh, supra, 560 F.2d at 1029 (brackets and ellipses in original). From this opaque passage it is impossible to deduce who should have known what or what might have been deemed an "apparently strong suspicion."

In re Leach, supra, 197 F. Supp. at 521, merely stands for the proposition that a creditor who fails to avail him- or herself of proper pre-discharge procedures may be guilty of undue laches. But, given the record of the case at bar, this court cannot say that appellee was anything less than diligent in investigating Levensaler's financial status before his discharge. In any event, *Leach* is silent on the critical question of whether suspicion is a species of knowledge.

Wood v. Carpenter, supra, involved the relatively more strict application of a statute of limitations, rather than the equitable doctrine of laches.[3] In *Wood,* the plaintiff made no attempt to explore several simple facts that could easily have been ascertained, despite having had six years to launch such an inquiry; the court surmised that at the time he made the bargain he later claimed was fraudulent, the plaintiff might well, even had he known the true facts, have considered the transaction a reasonable one. The court was also swayed by the point, not present in the case at bar, that the *Wood* plaintiff had utterly failed to state how and when he had come by knowledge of the fraud, that failure being manifest not just in his complaint, but, more important, in his reply to the defendant's demurrer.

The difficulty with appellant's position is clearly seen when one turns to another case upon which he relies, *In re Oleson,* 110 F. 796 (D.C. N.D. Iowa 1901). In *Oleson,* the plaintiff filed a petition to revoke the debtor's discharge in bankruptcy eleven months after the discharge. The court refused the petition, pointing out that all of the facts upon

which the petitioner relied had been in the record at the time of the discharge, that the petitioner had made no investigation at all before the discharge, that the petitioner had waited nearly until expiration of the statutory limit before bringing suit, and that the petitioner had made no suggestion that any new knowledge had come to it since the debtor's discharge. Every one of those points is a basis upon which to distinguish *Oleson* from the case at bar. The same sort of considerations make another case upon which Levensaler relies, *In re Howard*, 201 F. 577 (D.C. N.D. W.Va. 1913), inapplicable here.

The final case on the subject of laches to which appellant draws our attention, *In re Bates*, 27 F. 604 (D.C. S.D. N.Y. 1886), is a curiosity of scant relevance to the instant appeal. In *Bates*, also involving a petition for revocation of a discharge under § 15, the proper party in interest to petition had died between the date of the debtor's discharge and the filing of the petition by the deceased creditor's personal representative. The court imposed upon the representative the burden of showing that knowledge of the alleged fraud had come to the deceased after the debtor's discharge had been ordered.

Thus, with the exception of the cryptic sentence from *Appeal of Moynagh* quoted *supra* at 17, none of the cases upon which appellant relies concern the definition of knowledge for purposes of determining laches in a case in which the plaintiff performed sufficient investigations to generate suspicions of fraud at the time of discharge.

In fact, the law in this area is against appellant's argument. Laches is proved upon showing *actual* knowledge, unless the conduct of the party asserting the bar of laches has been open and there is no justification for the other party's inaction. *Chandon Champagne Corp. v. San Marino Wine Corp.*, 335 F.2d 531, 535 (2d Cir. 1964). In the case at bar, there is no assertion, nor any basis for one, that Levensaler's conduct was open, and justification for Hartford's relatively brief delay can easily be found in the quantum of

additional information discovered by Hartford after July 2, 1976. The Bankruptcy Court did not err in its interpretation of the law.

"Laches conceptualizes the inequity which would result if a stale claim were permitted to be enforced; its application is left to the sound discretion of the trial judge." *Sworob v. Harris,* 451 F. Supp. 96, 101 (E.D. Pa. 1978). Of the application of laches to a revocation proceeding under § 15, it has been said, "[e]ach case . . . turns on its own facts," *Collier on Bankruptcy,* par. 15.07 at 1502 (14th ed., 1982).[4] In the present case, the trial court heard extensive evidence pertinent to the question of laches; its reasoned determination of the issue is set forth at length. Mem., 69-72. The present court therefore concludes that there was no abuse of discretion.

C.

The third issue raised by appellant is that of whether the Bankruptcy Court erred by applying an incorrect standard of proof. In controversy is this sentence: "The court holds that the matters alleged in paragraphs 9 and 10 of the complaint, i.e. the Hope Building and Peter Maysa loans, and the conspiracy, have been proven by a fair preponderance of the evidence." Mem., 72-73. Appellant contends that a discharge may be revoked upon an allegation of fraud only if the plaintiff's case is proved by clear and convincing evidence. Appellant's Brief, at 32.

The question of the standard of proof in a § 15 proceeding has, in one form or another, vexed courts for some time. *See, e.g., In re Baiata,* 12 B.R. 813, 817 (Bkrtcy. E.D. N.Y. 1981) (proof by "fair preponderance of the evidence"; collecting cases); *In re Magnusson,* 14 B.R. 662, 667 (Bkrtcy. N.D. N.Y. 1981) (proof by "clear and convincing evidence"; collecting cases).

In the instant case, both parties have relied on the discussion of this issue in *Brown v. Buchanan*, 419 F. Supp. 199 (E.D. Va. 1975); *see* Appellant's Brief, at 35-36, Appellee's Brief, at 5-6. The analysis in *Brown*, in turn, begins with Chief Justice Taft's opinion for the court in *Oriel v. Russell*, 278 U.S. 358 (1929), in which it was held that "a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence," and that a "mere preponderance of evidence in such a case is not enough." *Id.* at 362. But Chief Justice Taft immediately went on to explain that: "The [turnover] proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed." *Id.* at 363. Indeed, *Oriel* contemplates a smooth transition, if necessary, from the turnover proceeding to a finding of contempt, as in fact happened in that case, with the seriousness of the sanction by the court influencing the evidentiary standard in the earlier proceeding.

A turnover proceeding is obviously quite different from a proceeding on a petition to revoke a discharge under § 15. That difference underlies the observation that "[w]hile the Supreme Court [in *Oriel*] has used language setting forth the standard of proof in somewhat different words, the cases resolve themselves into the language of a preponderance of the evidence which is clear and convincing," *Brown v. Buchanan, supra*, 419 F. Supp. at 202. In a turnover proceeding, failure to comply may result, in short order, in contempt. However, when a debtor does not prevail in an action for revocation of discharge, it does not follow that criminal prosecution is imminent, let alone that revocation of a discharge, even on grounds of fraud, is tantamount to criminal conviction. Still, courts have generally recognized that allegations of fraud are notoriously nebulous and attempts to prove such allegations often wander into conjecture. The consequence has been the adoption of the standard enunciated by Justice Clark, writing for the Court of Appeals: "While it is true that fraud and dishonesty may never be presumed and left to

mere speculation . . ., more is not required than that it be established by a fair preponderance of the evidence which, of course, must be clear and convincing," *General Finance Corp. v. Fidelity and Casualty Co. of New York,* 439 F.2d 981, 986 (8th Cir. 1971) (reversing trial court's finding that fraud had not been proved, where evidence consisted of inference drawn from diversion of funds and absence of explanation therefor by defendant).

In considering the case at bar, a few more general issues need to be clarified. First, it is manifest that determination of the standard of proof to be used in a § 15 proceeding is a question of federal law. *In re Barrett,* 2 B.R. 296, 298 (Bkrtcy. E.D. Pa. 1980). Thus, decisions construing state law, even if written by federal courts, are not necessarily applicable. Appellant's reliance on *McDonnell v. American Leduc Petroleums, Ltd.,* 456 F.2d 1170, 1176 (2d Cir. 1972) is misplaced, for that case involved New York and California law; *cf. Teledyne Industries, Inc. v. Eon Corp.,* 401 F. Supp. 729, 737 n.7 (S.D. N.Y. 1975), *aff'd, sub nom. Teledyne Industries, Inc. v. Podell,* 546 F.2d 495 (2d Cir. 1976).

Second, it is undisputed that conduct by the debtor that would suffice to preclude a discharge will also suffice to warrant revocation of a discharge already granted. *Keeble v. Sulmeyer,* 290 F.2d 127, 129 (9th Cir. 1961); *In re Hannan,* 127 F.2d 894, 896 (7th Cir. 1942). It is also quite clear that when an objection to discharge is made on the basis of the debtor's alleged "false oath or account," under former 11 U.S.C. § 14, "under the majority rule only a fair preponderance of evidence is necessary to sustain the objection," 4 Collier on Bankruptcy par. 727.04 at 727-49 (15th ed., 1982). *See also Farmers Co-op. Assn. of Talmage, Kan. v. Strunk,* 671 F.2d 391, 395 (10th Cir. 1982); *In re Robinson,* 506 F.2d 1184, 1187 (2d Cir. 1974). "The false oath which is a sufficient ground for denying a discharge may consist of . . . a false statement or omission in the debtor's schedules," 4 *Collier on Bankruptcy* par. 727.04 at 727-51 (15th ed., 1982).

Third, it is of course the case that only three standards of proof — proof beyond a reasonable doubt, proof by clear and convincing evidence, and proof by a preponderance of the evidence — are usually distinguished. *See Addington v. Texas,* 441 U.S. 418, 423-425 (1979). Yet there is no inconsistency in speaking of proof by "a fair preponderance of the evidence which [is] clear and convincing," *General Finance Corp. v. Fidelity and Casualty Co. of New York, supra,* 439 F.2d at 986. Under such a standard, the burden of proof is defined as "a fair preponderance of the evidence," while "[t]he 'clear and convincing evidence' standard controls the quality or character of the evidence on which the [finder of fact] may find fraud," *First Virginia Bankshares v. Benson,* 559 F.2d 1307, 1320 (5th Cir. 1977), *cert. denied, sub nom. Walter E. Heller & Co. v. First Virginia Bankshares,* 435 U.S. 952 (1978).

With these background considerations in mind, it is apparent that the Bankruptcy Court committed no error in weighing the evidence. With respect to the Hope Building and Peter Maysa loans, the court found revocation of Levensaler's discharge warranted because Hartford had proved that Levensaler omitted those loans from the creditor schedules filed with his voluntary petition. Mem., 61-65. Such an omission is clearly grounds for denying discharge under § 14, *see* Mem., 62, and that which will bar discharge will also support revocation of discharge. *Keeble v. Sulmeyer, supra.* Finally, there is no doubt that the standard of proof in such a case, *i.e.,* one involving a false oath, is that of "a fair preponderance of the evidence," *In re Robinson, supra,* 506 F.2d at 1187. The only question remaining, with respect to the loans, is one that may, under *Robinson,* be superfluous: Can the evidence be characterized as clear and convincing? That question, if asked at all, can only be answered affirmatively. For, as the Bankruptcy Court pointed out, Levensaler's *own* account of his conduct would also have sufficed to warrant revocation of his discharge. Mem., at 16 n.7. In short, no matter whose testimony the court credited, the legal consequence would have been the same. Under such circumstances, the

evidence upon which the court relied may be characterized as clear and convincing.

The Bankruptcy Court also found that the events it referred to as the "conspiracy" supported revocation of Levensaler's discharge under § 15(2). Mem., 66-67. Since subsection (2) merely adds some specificity and breadth to subsection (1) of § 15, see 4 *Collier on Bankruptcy*, par. 727.15 at 727-100 to 727-101 (15th ed., 1982), there is no reason to suppose that the requisite standard of proof is affected one way or the other.

The Bankruptcy Court found the "conspiracy" proved by a fair preponderance of the evidence. Mem., 72-73. That evidence, like the evidence concerning the loans, can be characterized as "clear and convincing." The trial court carefully examined the testimony it had heard before making its findings of fact. Mem., 46-50. In making those findings, the court did not resort to presumptions or "mere speculation," *General Finance Corp. v. Fidelity and Casualty Co. of New York, supra*, 439 F.2d at 986. Indeed, where the court was, in effect, requested by Hartford to rely on presumptions or speculations, the court found that Hartford had failed to carry on its burden of proof; accordingly, numerous allegations made by Hartford were rejected. Mem., 50-54. It is apparent that the evidence upon which the trial court did rely was indeed clear and convincing.

Appellant argues to the contrary, pointing out that the trial court itself characterized some of the testimony heard as "discursive, confusing and sometimes contradictory," Appellant's Brief, at 32, *quoting* Mem., at 18 n.8. However, the trial court was merely making the point that the testimony in question, while lengthy at trial, had been drastically condensed in the court's summary. The court nowhere suggests that it relied on portions of that testimony that remained confusing or contradictory at the conclusion of the trial, and appellant has nowhere suggested that the court's summary of the pertinent testimony is inaccurate.

Finally, appellant notes that the Bankruptcy Court, while "concluding that [Levensaler] had an interest in the Ducci-Woods joint venture, conceded that 'the matter is not completely free from doubt.' " Appellant's Brief, at 32, *quoting* Mem., at 46. But proof beyond a reasonable doubt is not the standard of proof applicable in this case.

D.

Appellant claims that the Bankruptcy Court erred in denying two motions made by appellant, one to dismiss the complaint and one to bifurcate trial, creating a preliminary hearing on the issues of laches. Having already determined that the complaint was properly pleaded and that the Bankruptcy Court did not err in concluding that Hartford proved its case at trial, this court finds no error in the denial of the motion to dismiss. Appellant's argument that there is an entitlement to a pretrial hearing on the issue of laches is simply a reworking of the argument, already rejected *supra* at 14, that freedom from undue laches must be pleaded *in haec verba*.

E.

As a fifth basis for appeal, Levensaler argues that the Bankruptcy Court lacked any evidence for its conclusions that Levensaler had an undisclosed interest in the profits of the joint venture undertaken by Ducci Co. and Woods Co. and that Ducci's $20,000 contribution, by way of unrepaid "loan" to Ann Levensaler, to the creation of EES was in fact a payment to Kenneth Levensaler.

It is not necessary to address this contention in detail, for the essence of Levensaler's argument is simply a disagreement with the trial court's findings of fact, some of which, admittedly, are based upon inference. It should, however, be noted that William and Jon Kerin testified that, well before the event, Levensaler had told them of a

scheme that would allow him to participate in the profits of the joint venture. The court credited that testimony. Mem., 46-47. Appellant argues that the Kerins testified that Levensaler had told them specifically that his share of the profits would be channeled through Woods, whereas the trial court found that it had been channeled through Ducci Co. Appellant's Brief, at 41-43. However, there is no reason to suppose that, at the time he informed the Kerins of the plan, Levensaler had perfected all the details or that, if he had, he would necessarily have communicated all of them.

Appellant objects to the court's conclusion about EES because the court made no explicit finding that Kenneth Levensaler benefited from the $20,000 loaned by Ducci to Ann Levensaler. Appellant's Brief, at 43-45. However, appellant's argument amounts only to a disagreement with the inferences drawn by the finder of fact. Mem., 49. In any event, Kenneth Levensaler clearly benefited from the creation of EES, made possible by Ducci's funds, inasmuch as Levensaler became president, treasurer, and operating manager of the company.

In passing, appellant argues that the trial court discredited the testimony of an accountant, Robert Kelley, who discussed the profits earned by the joint venture. Appellant's Brief, at 43. Appellant has misinterpreted the trial court's decision. The joint venture showed a profit of $297,525.15. Of that profit, $148,762.57 (50%) went to Ducci Co., $89,257.55 (30%) went to Woods Co., and $59,505.03 was earmarked as reimbursement to Ducci Co. for overhead. The last figure — which constituted 20% of the profits — mystified Kelley, because Ducci Co. had contributed only capital to the joint venture. On the other hand, Levensaler had earlier told the Kerins that he would receive a third of the profits from the joint venture — not a fifth. Hence, the theory that the supposed overhead reimbursement was designed as a covert payment to Levensaler seemed at first to be at odds with the Kerins' testimony.

With respect to all that, the court made a simple point. The profits of the joint venture, as stated, actually reflected some profits *not* attributable to the joint venture. Once the figure for the joint venture's profits was corrected — to $249,986.54 — the overhead reimbursement share was closer to 33%, rather than to 20%, of the total profit. Thus, the inference that the overhead reimbursement went in reality to Levensaler fit quite well with the Kerins' testimony. Mem., 48. In developing this analysis, the trial court nowhere discredited Kelley's testimony in the slightest.

F.

The last issue before the court on this appeal concerns two motions to strike testimony made by Levensaler at trial. The first motion, directed at testimony by Penrose Wolf, a Hartford employee, was denied by the trial court. Mem., 69. Levensaler asserts that denial of that motion was error, because the testimony concerned freedom from laches, which, he claims, had not been properly pleaded. This issue has been addressed already, see *supra* at 14, and that analysis need not be repeated here. The trial court did not err.

Appellant also argues that the trial court erred in failing to rule on a second motion to strike, one directed at the testimony of William Hackett; appellant contends that Hackett's testimony impeached the credibility of Robert Kelley, one of Levensaler's witnesses, as to a collateral issue, and that therefore Hackett's testimony should have been ruled inadmissible under the doctrine of *Todd v. Bradley*, 99 Conn. 307, 323-324 (1923). Assuming that this state evidentiary rule has any bearing on the federal proceedings with which we are dealing, it is nonetheless obvious that appellant's point is not well-taken. Kelley's testimony was never discredited by the trial court. With respect to Kelley's analysis of the joint venture profits, see *supra*, at 29-30. Appellant bases his argument on one

sentence from the trial court's decision: "Ducci's explanation that, as described by Kelley, this undocumented retention by [Ducci Co.] of a separate 20% was for interest on borrowed money, telephone, and travel expenses is not convincing." Mem., at 48; Appellant's Brief, at 49. Appellant reads this sentence as a "refusal to believe Kelly [sic]," *id.* However, the sentence actually reflects, of course, a refusal to believe Ducci.

Thus, at no time did the trial court discredit the testimony of Kelley; nor, in its discretion, does the trial court ever refer to Hackett. The trial court's error, if any, in failing to rule on Levensaler's motion to strike Hackett's testimony, was harmless. Rule 61, Fed. R. Civ. P.; Rule 905, Bankruptcy Rules.

IV.

Upon a consideration of all of the issues raised on this appeal, this court concludes that the Bankruptcy Court committed no error in ordering revocation of the discharge in bankruptcy originally granted Kenneth Levensaler, and the order of the Bankruptcy Court is therefore AFFIRMED.

This case is remanded to the Bankruptcy Court for such further proceeding as it may be necessary to complete in the ordinary course of administration of this estate.

It is so ordered.

Dated at Hartford, Connecticut, this 1st day of August, 1983.

/s/ Jose A. Cabranes
Jose A. Cabranes
United States District Judge

NOTES

[1] Effective October 1, 1979, § 15 of the Bankruptcy Act, 11 U.S.C. § 33, was repealed. The current provision covering revocation of discharge in a Chapter VII proceeding is 11 U.S.C. § 727(d), (e). Former § 15, as amended in 1970, provides:

> The court may revoke a discharge upon the application of a creditor, the trustee, the United States attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

Before its amendment in 1970, former § 15 provided:

> The court may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioner since the granting of the discharge and that the actual facts did not warrant the discharge.

Throughout the text, reference is made simply to "§ 15." For present purposes, the distinction between § 15 before and after the 1970 amendment is of no particular significance.

[2] Despite the pendency of the instant appeal, there have been some proceedings before the Bankruptcy Court since July 9, 1980. *See Matter of Levensaler,* 13 B.R. 140 (Bkrtcy. D. Conn. 1981).

[3] Section 15 has, of course, a statute of limitations, quite apart from its reference to the concept of laches. *See* Note 1, *supra*.

[4] Note that the citation here is to the *fourteenth* (and not, as elsewhere in the text, the *fifteenth*) edition of this treatise. Since October 1, 1979, the date on which 11 U.S.C. § 33 was superseded by 11 U.S.C. § 727, the concept of laches has been eliminated as a consideration required by statute in revocation proceedings; 11 U.S.C. § 727 contains no mention of the doctrine. Thus, the present edition of *Collier on Bankruptcy* does not discuss this area of the law.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of February, one thousand nine hundred and eighty-four.

UNITED STATES COURT OF APPEALS
FILED FEB 01 1984
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PRESENT:
HONORABLE J. EDWARD LUMBARD,
HONORABLE THOMAS J. MESKILL,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

IN RE:	)	
KENNETH M.	)	
LEVENSALER,	)	
Debtor,	)	
	)	83-5046
HARTFORD ACCIDENT AND	)	
INDEMNITY COMPANY,	)	Docket No. 83-5046
Plaintiff-Appellee,	)	
v.	)	
KENNETH M. LEVENSALER,	)	
Defendant-Appellant.	)	

This is an appeal from a decision of the United States District Court for the District of Connecticut, Cabranes, *J.*, which affirmed an order of the United States Bankruptcy Court for the District of Connecticut, Krechevsky, *J.*, revoking the discharge in bankruptcy of appellant under section 15 of the Bankruptcy Act of 1898, 11 U.S.C. § 33 (repealed 1979).

This cause came on to be heard on the transcript of record from the said district court and was argued by counsel.

Appellee introduced testimonial and documentary evidence of appellant's fraudulent transactions. The contradictory evidence consisted principally of appellant's testimony, which the bankruptcy court found "unconvincing" and lacking "believability." *In re Levensaler,* No. H-76-447, slip op. at 11, 49 (Bkrtcy. D. Conn. June 10, 1980). Although the bankruptcy court stated that the allegations of fraud had been proven by "a fair preponderance of the evidence," *id.* at 72-73, we are satisfied, as was the district court, that the evidence was sufficient to meet the clear and convincing standard.

We agree with the district court that appellee's complaint met the jurisdictional requirements of section 15 of the former Bankruptcy Act. A complaint need not strictly comply with the specific wording of section 15 as long as the jurisdictional elements can be inferred from the pleadings.

From the evidence the bankruptcy court could conclude that appellee brought its action as soon as practicable. Therefore, the district court properly held that the bankruptcy court did not abuse its discretion in finding that appellee was not guilty of laches.

The judgment of the district court is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

/s/ J. Edward Lumbard
J. Edward Lumbard
U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

From

RULES of the UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

Supplementing the Federal Rules of Appellate Procedure

§0.23 Dispositions in Open Court or by Summary Order:

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.